DOCKET

No. 07-1216

Title: Philip Morris USA Inc., Petitioner

v.

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased

Docketed: March 24, 2008

Lower Ct: Supreme Court of Oregon

Case Nos.: (S051805)

Decision Date: January 31, 2008

Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 24 2008	Petition for a writ of certiorari filed. (Response due April 23, 2008)
Apr 23 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Apr 23 2008	Brief of respondent Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased in opposition filed.
Apr 23 2008	Brief amici curiae of Washington Legal Foundation and Allied Educational Foundation filed.
Apr 23 2008	Brief amici curiae of Associated Oregon Industries, et al. filed.
Apr 23 2008	Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
May 5 2008	Reply of petitioner Philip Morris USA Inc. filed. (Distributed)
May 6 2008	DISTRIBUTED for Conference of May 22, 2008.
May 27 2008	DISTRIBUTED for Conference of May 29, 2008.
Jun 2 2008	DISTRIBUTED for Conference of June 5, 2008.
Jun 9 2008	Petition GRANTED limited to Question 1 presented by the petition.
Jul 15 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including August 13, 2008.
Jul 15 2008	The time within which to file respondent's brief on the merits is extended to and including October 2, 2008.
Aug 7 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from cunsel for the petitioner.
Aug 12 2008	Consent to the filing of amicus curiae briefs, in support of either party or neither party, received from counsel for the respondent.
Aug 13 2008	Joint appendix filed.
Aug 13 2008	Brief of petitioner Philip Morris USA Inc. filed.
Aug 19 2008	Brief amicus curiae of Pacific Legal Foundation filed.
Aug 20 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Aug 20 2008	Brief amicus curiae of National Association of Manufacturers filed.

Aug 20 2008	Brief amicus curiae of National Association of Mutual Insurance Companies filed.
Aug 20 2008	Brief amicus curiae of Criminal Justice Legal Foundation in Support of Neither Party filed.
Aug 20 2008	Brief amici curiae of Associated Oregon Industries, et al. filed.
Aug 20 2008	Brief amici curiae of Washington Legal Foundation, et al. filed.
Sep 8 2008	SET FOR ARGUMENT ON Wednesday, December 3, 2008.
Sep 23 2008	CIRCULATED.
Oct 2 2008	Brief of respondent Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased filed. (Distributed)
Oct 9 2008	Brief amicus curiae of Oregon Trial Lawyers Association filed. (Distributed).
Oct 9 2008	Brief amici curiae of Retired Oregon Supreme Court Justices Susan M. Leeson, et al. filed. (Distributed).
Oct 9 2008	Brief amici curiae of Public Justice, P.C., et al. filed. (Distributed).
Oct 9 2008	Brief amici curiae of Oregon,et al. filed. (Distributed)
Oct 9 2008	Brief amici curiae of Federal Procedures Scholars filed. (Distributed).
Oct 28 2008	Record recevied from the Supreme Court of Oregon. (8 boxes)
Oct 31 2008	Record received from the Appeals Court of Oregon. (1 box)
Nov 3 2008	Reply of petitioner Philip Morris USA Inc. filed. (Distributed).
Dec 3 2008	Argued. For petitioner: Stephen M. Shapiro, Chicago, Ill. For respondent: Robert S. Peck, Washington, D.C.

PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

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No. (1)

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

When this case was last before it, this Court reversed the decision of the Oregon Supreme Court and held that due process precludes a jury from imposing punitive damages to punish for alleged injuries to persons other than the plaintiff. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007). This Court then remanded the case to the Oregon Supreme Court with directions to "apply the [constitutional] standard we have set forth." *Ibid.* On remand, however, the Oregon Supreme Court refused to follow this Court's directive. Instead, the Oregon court "adhered to" the judgment that this Court had vacated because it found that Philip Morris had procedurally defaulted under state law and thereby forfeited its claim of federal constitutional error. App., *infra*, 22a.

The questions presented—the second of which was accepted for review but not reached when this case was last before the Court—are:

1. Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

2. Whether a punitive damages award that is 97 times the compensatory damages may be upheld on the ground that the reprehensibility of a defendant's conduct can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly-held company that owns ten percent or more of Philip Morris USA's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Morris USA ("Philip Morris") petitions for a writ of certiorari to review the judgment of the Supreme Court of Oregon in this case.

OPINIONS BELOW

The decision of the Oregon Supreme Court (App., *infra*, 1a-25a) is reported at 176 P.3d 1255. The earlier decision of the Oregon Supreme Court (App., *infra*, 26a-66a) is reported at 127 P.3d 1165. The 2004 decision of the Oregon Court of Appeals (App., *infra*, 67a-114a) is reported at 92 P.3d 126, and the 2002 decision of the Oregon Court of Appeals (App., *infra*, 115a-154a) is reported at 48 P.3d 824. The trial court's oral ruling on Philip Morris's proposed instruction (App., *infra*, 155a-165a) is unreported.

JURISDICTION

The judgment of the Oregon Supreme Court was entered on January 31, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article VI of the United States Constitution provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law."

STATEMENT

In *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007), this Court held that, "upon request," a trial court must protect a defendant against the risk that a jury will predicate a punitive damages award on injuries to persons not before the court because punishment on such a basis violates due process. The Court observed that, during the trial, Philip Morris had requested protection against that risk, but that the Oregon courts had rejected that request on the ground that punishment for harms to nonparties was constitutionally permissible. *Id.* at 1061, 1062. Because the Oregon courts had applied an incorrect constitutional standard, this Court "remand[ed] this case so that the Oregon Supreme Court can apply the standard we have set forth." *Id.* at 1065.

On remand, however, the Oregon Supreme Court flatly refused to follow this Court's directive. Instead, the Oregon court held that Philip Morris had forfeited the federal right recognized by this Court when it failed to comply at trial with a novel and patently unreasonable application of a state-law procedural rule—a rule that had never before been invoked by any Oregon court during the nine years of appellate litigation in this case.

The Oregon Supreme Court's decision should be summarily reversed for three reasons. First, as an inferior court, the Oregon Supreme Court was bound by this Court's directive to "apply" the federal consti-

tutional principle announced by this Court and overstepped its authority when it refused to do so. Second, to the extent that a state-law procedural rule impeded consideration of Philip Morris's federal claim, the Oregon courts were required to apply that rule *before*—and not *after*—this Court decided the federal issue. Finally, the waiver rule asserted by the Oregon Supreme Court is not an independent and adequate state ground for the judgment. Rather, that rule is unreasonable, inconsistently applied, and nothing more than a pretext for the Oregon Supreme Court's refusal to protect Philip Morris's due process rights. Summary reversal—or alternatively full review on the merits—is warranted to enforce this Court's mandate in *Williams*, to prevent state courts from deploying state procedural rules to evade this Court's constitutional decisions, and to protect this Court's role as the final arbiter of federal constitutional rights.

This case also presents a second important question, which was accepted for review two years ago but not reached: Whether the jury's $79.5 million punitive award—an amount 97 times the compensatory damages—is unconstitutionally excessive. This ratio of punitive to compensatory damages far exceeds the "single-digit ratio" that this Court has held will ordinarily be the constitutional limit. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003). In the decision below, however, the Oregon Supreme Court left intact its earlier ruling that the other two guideposts identified in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 574-75 (1996), can "override" the constitutional requirement of a reasonable relationship between punitive and compensatory damages. The need for review of that holding is no less pressing now than it was in 2006.

A. The Trial

Jesse Williams began smoking cigarettes in 1950. App., *infra*, 5a. After 1955, Williams smoked Marlboros, manufactured and marketed by petitioner Philip Morris. *Id.* at 29a. Williams eventually smoked three packs of cigarettes a day. He was diagnosed with cancer in 1996 and died in March 1997. *Ibid.* Alleging negligence and fraud, Williams's widow ("plaintiff") sued Philip Morris.

At trial, plaintiff mounted a wide-ranging attack on 50 years of Philip Morris's conduct. In closing arguments, plaintiff urged the jury to punish Philip Morris not only for the harm caused to Williams, but also for the alleged harms suffered by countless other, unidentified people who were not before the court—people whose individual circumstances were never presented to the finder of fact. 127 S. Ct. at 1061, 1063.

Philip Morris submitted to the trial court Requested Instruction Number 34, which would have instructed the jury "not to punish the defendant for the impact of its alleged misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claims." App., *infra*, 159a-160a. Philip Morris argued at the charge conference that the federal Constitution mandated an instruction of this kind. *Id.* at 157a-158a, 162a. The trial court, however, determined that such an instruction was *not* constitutionally required. *Id.* at 161a-162a. Instead, the court told the jury that it was free to award any amount of punitive damages up to $100 million, the amount arbitrarily requested in plaintiff's complaint.

The jury found for plaintiff on both her fraud and negligence claims and awarded $821,485 in compensatory damages (reduced to $521,485 pursuant to Oregon's statutory cap on wrongful death damages). The jury also awarded $79.5 million in punitive damages for fraud, but refused to award any punitive damages on the negligence claims.

On post-trial motions, the trial court held that the punitive damages award was "excessive under federal standards" and reduced it to $32 million—still 39 times the compensatory damages verdict. Both parties appealed.

B. Appeal And GVR

On appeal, the Oregon Court of Appeals rejected on the merits Philip Morris's contention that the jury should have been instructed not to impose punitive damages to punish for harms to non-parties. App., *infra*, 140a. It further concluded that the jury's verdict was not unconstitutionally excessive and accordingly reinstated the $79.5 million award. *Id.* at 152a.[1]

After the Oregon Supreme Court denied discretionary review, Philip Morris petitioned this Court for a writ of certiorari, raising both the punishment for harms to non-parties issue and the excessiveness claim. This Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). See *Philip Morris USA, Inc.* v. *Williams*, 540 U.S. 801 (2003).

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[1] Including interest, the award now amounts to nearly $143 million.

C. Proceedings On The First Remand

On remand, the Oregon Court of Appeals held that *State Farm* had no impact on its analysis or conclusions and again upheld the jury's $79.5 million verdict—principally because of alleged harm that Philip Morris purportedly caused to unidentified members of the "Oregon public." App., *infra*, 112a-113a, 114a. The Court of Appeals once again rejected—on the merits—Philip Morris's argument that the trial court had committed constitutional error by failing to give the company's proposed instruction on punishment for harms to non-parties, holding that punishment on that basis was entirely appropriate under the federal Constitution. *Id.* at 102a-105a.

Philip Morris petitioned the Oregon Supreme Court for review, once again presenting (*inter alia*) the question whether the Court of Appeals had unconstitutionally permitted the jury to punish Philip Morris based on alleged harm to non-parties. App., *infra*, 173a-175a. The Oregon Supreme Court accepted discretionary review of that question and affirmed.

According to the court, the jury could have found that Philip Morris's conduct affected many smokers other than Williams. App., *infra*, 35a. Although the court conceded there was no evidence that anyone other than Williams had relied on, or been injured as a result of, any of Philip Morris's representations, the court held that reliance and causation could be presumed, based upon the court's own "assessment of human nature"—an "assessment" that the court also "attributed" to the jurors. *Id.* at 36a n.1.

The Oregon Supreme Court rejected on the merits Philip Morris's argument that the trial court had violated the federal Constitution by failing to instruct the jury not to punish Philip Morris for harms to non-parties. The court held that nothing in this Court's decisions prohibited the jury from punishing Philip Morris for injuries to non-parties. App., *infra*, 8a.[2]

Next, the court rejected Philip Morris's argument that the $79.5 million punitive damages award was unconstitutionally excessive. It considered the three *BMW* "guideposts" for determining whether a punitive award is unconstitutionally excessive: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of punitive to compensatory damages; and (iii) any relevant legislatively established penalties for comparable conduct. *BMW*, 517 U.S. at 574-75. Taking the evidence in the "light most favorable to the plaintiff," the court concluded that the record supported a finding that Philip Morris's conduct was "extraordinarily reprehensible." App., *infra*, 54a, 66a. As the court interpreted the evidence, the jury could have found that Philip Morris's misconduct affected "many Oregonians" other than Jesse Williams

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[2] *After* considering and rejecting *on the merits* Philip Morris's federal claim that it could not be punished for alleged harm to non-parties, the court briefly noted that Philip Morris had not preserved any challenge other than an assignment of error for failing to deliver Philip Morris's Requested Instruction Number 34. App., *infra*, 51a-52a. In particular, the court asserted that Philip Morris had not preserved a separate challenge to the instructions "actually given." *Ibid.* Importantly, the court did not even *suggest* that any failure to object to the instructions "actually given" precluded consideration of Philip Morris's federal constitutional argument on harm to non-parties—an argument the court had by then rejected on the merits.

who kept smoking and became ill or died. *Id.* at 55a. The court further reasoned that the jury could have concluded that the misconduct harmed "a much broader class of Oregonians": those who "kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies." *Ibid.* Therefore, the court concluded, "the first *Gore* guidepost favors a very significant punitive damage award." *Id.* at 55a.

The court similarly held that the third *BMW* factor—the legislatively established penalties for comparable misconduct—supported a large punitive award: "Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter." App., *infra*, 59a.

Addressing the relationship between the compensatory and punitive awards, the court recognized that "the second *Gore* guidepost is not met." App., *infra*, 64a. It acknowledged that "[a]ll arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the [United States Supreme] Court has said ordinarily will apply in the usual case." *Ibid.*[3] Nevertheless, the court explained, "the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 66a.

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[3] If the statutorily-capped amount of compensatory damages is used as the denominator, the ratio in this case rises from 97:1 to 152:1.

Philip Morris filed a petition for writ of certiorari in this Court. The petition was granted on May 30, 2006. 547 U.S. 1162.

D. This Court's Decision

This Court accepted review on two questions: (i) whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties; and (ii) whether the constitutional requirement of a reasonable relationship between punitive and compensatory damages is inapplicable in cases where the court determines that the jury could have found the defendant's conduct to be highly reprehensible and equivalent to a crime. See 127 S. Ct. at 1062. The Court found it necessary to rule only on the first of these questions, holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063.

Having held "explicitly that a jury may not punish for the harm caused others," 127 S. Ct. at 1065, the Court drew a critical distinction that was anticipated by Philip Morris's proposed instruction: although a jury may consider harms to non-parties in gauging the reprehensibility of the defendant's misconduct, the jury must *not* "go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. The Court "conclude[d] that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for

harm caused strangers." *Ibid.* Where the risk of jury confusion is

> a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—*a court, upon request, must protect against that risk.* Although the States have some flexibility to determine what *kind* of procedures they will implement, *federal constitutional law obligates them to provide some form of protection* in appropriate cases.

Id. at 1065 (emphases added; emphases of "kind" and "some" in original).

The Court also observed that Philip Morris had requested protection against the risk of punishment for harms to non-parties by proposing an instruction that "distinguishe[d] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." 127 S. Ct. at 1064 (quoting Philip Morris's proposed instruction). The Oregon Supreme Court, like the trial court and the Oregon Court of Appeals before it, had "rejected that claim" on the merits. *Ibid.*

This Court concluded its opinion by telling the Oregon Supreme Court what was to be done on remand:

> As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme

> Court can *apply the standard* we have set forth.

127 S. Ct. at 1065 (emphasis added). Because the application of the proper constitutional standard could lead to either "the need for a new trial, or a change in the level of the punitive damages award," *ibid.*, this Court did not reach the second question presented: whether the $79.5 million award was unconstitutionally excessive.

Justice Ginsburg's dissent, joined by Justices Scalia and Thomas, chided the majority for reaching the merits of the federal constitutional claim. The dissenters contended that Philip Morris had not "preserve[d] any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument." 127 S. Ct. at 1068 (Ginsburg, J., joined by Scalia & Thomas, JJ., dissenting). They further suggested that Philip Morris's proposed jury instruction had not been sufficient to preserve its claim of constitutional error. *Id.* at 1069.[4] That view was implicitly rejected by a majority of the Justices, who addressed Philip Morris's due process claim on the merits.

E. Proceedings On Remand

On remand, the Oregon Supreme Court refused to "address the constitutional standard that the United States Supreme Court has articulated" and instead "adhere[d] to" the opinion that this Court

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[4] Justice Stevens wrote separately to express disagreement with the majority on the merits. 127 S. Ct. at 1065-67 (majority opinion "announc[ed] a new rule of substantive law" that unwisely "expand[ed] the concept of substantive due process") (Stevens, J., dissenting).

had rejected. App., *infra*, 13a, 22a. The Oregon court assumed that the portion of the proposed instruction that addressed harms to non-parties "clearly and correctly articulated the standard required by due process" and was therefore correct as a matter of federal law. *Id.* at 21a. But the Oregon court held that it did not need even to consider a remedy for the trial court's instructional error because Philip Morris's proposed jury instruction "was flawed for other reasons that we did not identify in our former opinion," *id.* at 3a—reasons that, in fact, had never been relied upon by either the Oregon Court of Appeals or the Oregon Supreme Court in nine years of appellate litigation.

Philip Morris's error, according to the Oregon Supreme Court, was that it grouped its proposed charge on harms to non-parties with other paragraphs concerning wholly separate topics that, the court found, "did not state [Oregon] law correctly," in two respects. App., *infra*, at 21a. One of those paragraphs would have told the jury that it "may," rather than "shall," take into account various factors in awarding punitive damages. And another paragraph would have asked the jury to consider the extent to which any misconduct by Philip Morris was motivated by "illicit" profits, as opposed to having the jury consider all profits Philip Morris may have received from its sales of cigarettes in Oregon. *Id.* at 18a-22a.

The court recognized that those supposed errors did not have any impact on the trial court's refusal to instruct on harms to non-parties: the trial court had addressed and denied Philip Morris's federal claim separately from the other issues. *Id.* at 15a. But the court nevertheless held that Philip Morris had for-

feited its constitutional claim by "placing all the party's eggs in one instructional basket" (*id.* at 13a), and that this forfeiture was "an independent and adequate ground for affirming the trial judge's ruling." *Id.* at 14a. Finally, the court let stand without comment its prior holding that the jury's $79.5 million verdict was not constitutionally excessive. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD VACATE THE JUDGMENT AND ORDER THE OREGON SUPREME COURT TO APPLY THE CONSTITUTIONAL STANDARD ANNOUNCED IN *WILLIAMS*.

The Oregon Supreme Court's defiance of this Court's directive should not be countenanced. This Court held that "the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal," and it remanded the case "so that the Oregon Supreme Court can apply the standard we have set forth." 127 S. Ct. at 1065. The Oregon Supreme Court had no authority either to disobey the clear instructions of this Court or to conjure up state-law procedural grounds for the judgment *after* both it and this Court had reached the merits of Philip Morris's federal claim. Moreover, as a matter of federal law, the Oregon Supreme Court's rationale for refusing to address Philip Morris's due process claim is not an independent and adequate state ground.

A. The Oregon Supreme Court Lacked The Power To Disobey This Court's Directive.

The Oregon Supreme Court's decision runs roughshod over a principle fundamental to our judi-

cial system—that this Court's decisions must be scrupulously honored by the lower courts. The court below violated that principle by refusing to "apply the [constitutional] standard set forth" in the Court's opinion. As Justice Jackson explained, from "its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs* v. *Penn. R. Co.*, 334 U.S. 304, 306 (1948); see also, *e.g.*, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). This Court has not hesitated to grant certiorari to reverse lower court decisions that contravene the clear command of its remand instructions.

In *Yates* v. *Aiken*, 484 U.S. 211 (1988), for example, the issue was whether the South Carolina Supreme Court had failed to comply with this Court's instruction to apply the rule announced in an intervening constitutional decision of this Court. On remand, the South Carolina court had simply concluded that the defendant was not entitled to relief under *state* law. This Court reversed: "Our mandate contemplated that the state court would consider whether, as a matter of *federal* law, petitioner's conviction could stand * * *." *Id.* at 215 (emphasis added).[5]

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[5] See also, *e.g.*, *Sumner* v. *Mata*, 455 U.S. 591, 597 (1982) (per curiam) (summarily reversing and remanding because the court of appeals had failed to comply with this Court's remand instructions); *Stanton* v. *Stanton*, 429 U.S. 501, 502 (1977) (per curiam) (rejecting Utah Supreme Court's attempt on remand to avoid addressing the constitutional error identified by this Court); *Utah Pub. Serv. Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 471 (1969) (reversing in an antitrust action because this Court's "mandate directed complete divestiture" yet the lower court "did not * * * direct complete divestiture").

Here, this Court gave the Oregon Supreme Court clear directions on remand: "[W]e believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth." 127 S. Ct. at 1065. The Court plainly contemplated that on remand the Oregon Supreme Court would determine the proper remedy for the violation of Philip Morris's constitutional right to be protected against the risk of punishment for harms to non-parties. That is why the Court stated in the very next sentence that "the application of this standard may lead to the need for a new trial, or a change in the level of the punitive damages award." *Ibid.*

In the face of the Court's clear instruction to apply the correct due process standard to *this case*, the Oregon Supreme Court was not free to refuse to apply that standard on the basis of previously unmentioned state-law grounds. Reversal is warranted to implement this Court's judgment in *Williams* and to vindicate the Court's authority.

In the alternative, if the Court is not disposed to remand this case for a *third* time, the Court might wish to consider asserting its remedial power at this juncture and ordering a new trial that will be free from the constitutional error that the Court has identified. See *Aiken*, 484 U.S. at 215 ("Since the state court did not decide [the federal] question, we shall do so.").[6]

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[6] While the Court suggested in its prior opinion that a remittitur might cure the problem (see 127 S. Ct. at 1065), we submit that a new trial is clearly the only adequate remedy. It is im-

B. A State Court May Not Wait Until After This Court Decides A Federal Constitutional Claim To Interpose, For The First Time, A State-Law Bar To That Claim.

When Philip Morris's federal constitutional claim was first presented to and addressed by the Oregon Supreme Court, that court unquestionably had the authority to interpose a valid independent and adequate state ground for refusing to consider that claim, if one existed. But it could not do so for the first time on remand, *after* it and this Court had both addressed the merits of the federal claim. The Oregon courts lost the prerogative to invoke a state-law procedural bar to Philip Morris's due process rights when, given no fewer than three opportunities to interpose such a barrier, they nevertheless consistently adjudicated the merits of the federal question.

It is settled doctrine that, where a state court decision reasonably appears to rest on federal law, this Court presumes that there is no adequate and independent state ground to support the judgment.

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possible to ascertain at this stage what verdict a properly-instructed jury would have returned. Such verdict might well have been for a lesser amount than the remittitur a court might choose. The only appropriate remedy for a prejudicially erroneous instruction, therefore, is a new trial. See, *e.g.*, *Merrick* v. *Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1018 (9th Cir. 2007) (remittitur is "less appropriate [than a new trial] where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount"); *White* v. *Ford Motor Co.*, 500 F.3d 963, 973 (9th Cir. 2007) (remittitur cannot cure instructional error); *Werbungs Und Commerz Union Austalt* v. *Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (same). Indeed, this Court has reached that very conclusion in the context of criminal sentencing. See *Hicks* v. *Oklahoma*, 447 U.S. 343, 346 (1980).

Coleman v. *Thompson*, 501 U.S. 722, 735 (1991). In *Michigan* v. *Long*, 463 U.S. 1032 (1983), this Court set forth its approach to determining whether a decision rests on state-law grounds and is thus unreviewable:

> [W]hen * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so * * *. If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41.

It follows that, where a state court does *not* indicate that its decision rests on state-law grounds—where, to the contrary, it explicitly (and, here, exclusively) bases its decision on principles of federal law—it is impermissible for the state court to invoke a state-law ground for the judgment for the first time *after* this Court has ruled on the federal issue.

In *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam), this Court rebuffed a state court's similar attempt to manufacture a new state-law ground for affirmance on remand. This Court had held unconstitutional a judgment of civil contempt against the NAACP for failing to turn over to the State the names and addresses of its members.

The Court's mandate "remanded the case to the Supreme Court of Alabama 'for proceedings not inconsistent with' our opinion." *Id.* at 241. On remand, the Alabama Supreme Court refused to vacate the contempt judgment, finding for the first time that the NAACP had failed to comply with other aspects of the State's order. *Id.* at 242.

This Court summarily reversed, holding that the lower court had erred by finding a new rationale for upholding the judgment on remand, notwithstanding the federal constitutional defect found by this Court. When the case had been before this Court,

> [t]he State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance. * * * That was also the basis on which the issue was briefed and argued before us by both sides after certiorari had been granted. * * * And that was the premise on which the Court disposed of the case. * * * In these circumstances the Alabama Supreme Court is foreclosed from reexamining the grounds of our disposition.

Patterson, 360 U.S. at 243-44.

So too here. In their earlier consideration of the case, the Oregon courts did not hold that Philip Morris had failed to preserve its constitutional claim by making errors of state law in other parts of its proposed jury instruction. Instead, on the *two* previous occasions leading to remands by this Court, the Oregon courts addressed the *merits* of Philip Morris's federal claim. As in *Patterson*, the state court's decision to reach the merits of the federal claim in the earlier proceeding precludes it from rendering this

Court's review and ruling on the merits a meaningless exercise. See also *Aiken*, 484 U.S. at 218 ("Since it has considered the merits of the federal claim" already, the South Caroline Supreme Court "has a duty to grant the relief that federal law requires").

A contrary rule, allowing post-remand invocation of state-law grounds as an excuse for declining to remedy a constitutional violation, would be inconsistent with the sound administration of justice in our federal system and wasteful of this Court's limited resources. That is precisely why in *Long* the Court adopted the approach of presumptive jurisdiction over appeals from state court decisions that appear to rest on federal grounds. The Court rejected the alternative approach of remanding an ambiguous case back to state court for clarification of the grounds upon which it rests, in part "because of [concerns about] the delay and decrease in efficiency of judicial administration." 463 U.S. at 1039.[7]

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[7] This is unlike the situation in which the Court reverses a state-court decision that upheld a claim of federal right without reaching the question whether the claimant is independently entitled to relief under state substantive law. On remand from this Court, state courts remain free to recognize and apply state-law principles that offer broader protection of rights than federal law provides. See, *e.g.*, *Cooper* v. *California*, 386 U.S. 58, 62 (1967); cf. *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1038-42 (2008). They may not, however, deploy state-law rules to *defeat* the federal constitutional protections recognized by this Court in the very same case.

C. In Any Event, The State-Law Ground Invoked Below Did Not Provide An Independent And Adequate Basis For The Judgment.

This Court should also summarily reverse because the procedural bar invoked by the Oregon Supreme Court is not an "independent and adequate" state ground for the judgment: it is an arbitrary rule that is neither firmly established nor regularly followed, and of which Philip Morris had no fair notice when presenting its proposed jury instructions.

1. As A Matter Of Federal Law, Philip Morris Properly Preserved Its Constitutional Claim.

The adequacy of a state-law bar to a due process challenge is "itself a federal question." *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). As Justice Holmes explained for the Court, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). As a matter of federal law, the combination of a proposed jury instruction that correctly stated federal law and the presentation of oral argument was more than adequate to preserve Philip Morris's constitutional claim. The Oregon Supreme Court's post-hoc imposition of a stricter rule serves no legitimate state interest. See *Osborne* v. *Ohio*, 495 U.S. 103, 125 (1990) (invoking the "general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests").

The Oregon Supreme Court refused on remand to apply the correct constitutional standard to Philip Morris's due process claim because it found that the proposed jury instruction on punitive damages was not "correct in all respects" under Oregon law. App, *infra*, at 51a-52a. Remarkably, the Oregon Supreme Court did not give even cursory consideration to the portion of the instruction that was at issue in this Court's decision. Instead, the Oregon court identified two supposed errors of *state law* in *other portions* of the proposed instruction. First, the instruction would have told the jury that it "may," rather than "shall," take into account various factors in awarding punitive damages. And second, it asked the jury to consider the extent to which any misconduct by Philip Morris was motivated by "illicit" profits, as opposed to having the jury consider all profits Philip Morris may have received from its sales of cigarettes in Oregon. *Id.* at 18a-22a.

The principal defect in the Oregon Supreme Court's reliance on the "correct in all respects" rule is that such a rule serves no legitimate state interest where the erroneous part of a proposed instruction addresses a different point of law *that was separately considered by the trial court.* Thus, even assuming that the Oregon court's hairsplitting distinctions did identify "errors" in the proposed charge, the court's reliance on them to foreclose Philip Morris's due process claim is indefensible.

An examination of the manner in which the instruction was proposed and considered at trial demonstrates that Philip Morris adequately preserved its federal claim. Plaintiff claimed that Philip Morris had engaged in a 50-year national campaign to deceive a nation of smokers into believing that the

causal link between smoking and cancer had not been proven. In response, as this Court explained, "Philip Morris asked the trial court to tell the jury that 'you may consider the extent of harm suffered by others in determining what the reasonable relationship is' between any punitive award and 'the harm caused to Jesse Williams' by Philip Morris' misconduct, 'but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims.'" 127 S. Ct. at 1061 (ellipses and brackets omitted) (quoting from joint appendix).

That proposed instruction was part of Philip Morris's Requested Instruction Number 34, which also covered other subjects relating to punitive damages. As the Oregon Supreme Court acknowledged (App., *infra*, 6a), the trial court conducted a "line-by-line" analysis of Philip Morris's proposed charge, and considered and ruled upon the harms-to-non-parties provision as a distinct issue. *Id.* at 6a, 16a, 156a. With respect to the relevant portion of the proposed instruction, Philip Morris argued at the charge conference that the Constitution prohibits punishment for harms to non-parties. *Id.* at 162a. The trial court asked defense counsel to identify cases holding "that this element * * * has to be there for the jury." *Ibid.* Because there was no case squarely on point, the court refused to give any instruction on the subject. *Ibid.*

Thus, the trial court considered the relevant portion of Requested Instruction Number 34 in isolation and rejected it *not* because the court believed that *other portions* of the instruction misstated *state* law, but because the court disagreed with Philip Morris's

view that the instruction on harms to non-parties was required by *federal* law. App., *infra*, at 159a-162a. That the relevant instruction happened to appear with other paragraphs of Philip Morris's proposed charge under a single heading, rather than under its own separate heading, had no effect on the trial court's ruling at the charge conference; the court fully considered and rejected the federal due process claim both separately and on its merits. No change to other, unrelated parts of Requested Instruction Number 34 would have had any impact on the trial court's rejection of the harm-to-others portion of the instruction.

The Oregon Supreme Court nevertheless held on remand that Philip Morris forfeited its constitutional claim because its proposed instruction on harms to non-parties also included *other* paragraphs, on distinct points of law, "that did not state [Oregon] law correctly." App., *infra*, 21a. Under the Oregon Supreme Court's approach, had Philip Morris submitted the harms to non-parties instruction on a separate sheet of paper, and thereby avoided "placing all the party's eggs in one instructional basket" (*id.* at 15a), the federal claim would have been preserved.

This Court has repeatedly explained that where—as here—a defendant asserts a federal right clearly and gives the trial court an opportunity to consider the defendant's argument on the merits, the claim is preserved as a matter of federal law and cannot be barred by a state procedural rule. For example, a party has no duty to ask for a jury instruction on a point of law that the trial court has already rejected: "Were we to accept this position, we would force resort to an arid ritual of meaningless form, and would further no perceivable state interest." *Os-*

borne, 495 U.S. at 124-25 (internal quotation marks and ellipses omitted). See also *Douglas*, 380 U.S. at 422 ("No legitimate state interest would have been served by requiring repetition of a patently futile objection, already thrice rejected, in a situation in which repeated objection might well affront the court or prejudice the jury beyond repair."); *Henry* v. *Mississippi*, 379 U.S. 443, 447-48 (1965) ("A litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. * * * If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.").

The Oregon Supreme Court's rigid reliance upon a supposed requirement that a proposed "instruction" be "correct in all respects"—even in respects that have nothing to do with the matter at issue—is a classic example of a procedure that furthers no perceptible state interest and therefore cannot bar a federal claim. Indeed, it bears a striking resemblance to the forfeiture doctrine applied by the Alabama Supreme Court, and held inadequate by this Court, in *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288 (1964). There, the state court refused to reach the merits of the plaintiff's constitutional claim because it found errors in other portions of the plaintiff's brief: "[W]here unrelated assignments of error are argued together and one is without merit, the others will not be considered." *Id.* at 295 (internal quotation marks omitted). This Court rejected the "pointless severity" with which the Alabama Supreme Court applied this rule, noting that the NAACP's brief had simply grouped its assignments of errors together under the same numerical heading for stylistic purposes. *Id.* at 297. Similarly, Philip

Morris grouped separate parts of the jury instructions addressing punitive damages under a single, general heading ("PUNITIVE DAMAGES – PRODUCTS LIABILITY") for the convenience of the court. App., *infra*, 22a-25a. The trial court addressed each paragraph of the proposed instruction separately, and the supposed errors in other paragraphs had no effect on the court's consideration of the relevant instruction. Oregon has no legitimate interest in extinguishing federal due process rights through such trivialities.

2. The Novel Rule Announced By The Oregon Supreme Court Was Insufficient To Bar Philip Morris's Federal Claim.

The Oregon Supreme Court's rationale fails for a second reason. An independent state-law procedural bar is adequate to support a state court judgment only if it is a "firmly established and regularly followed state practice." *James* v. *Kentucky*, 466 U.S. 341, 348-49 (1984). A state rule that is novel or applied inconsistently is by definition inadequate to preclude consideration of a party's federal claim. See, *e.g.*, *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958).[8] "'Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon

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[8] See also, *e.g.*, *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-65 (1982) (procedure that had not been applied "evenhandedly to all similar claims" could not bar federal argument); *Staub* v. *City of Baxley*, 355 U.S. 313, 318-20 (1958) (where state decision was contrary to "long line" of prior rulings, it was not an adequate state ground for decision"); *Ward* v. *Love County*, 253 U.S. 17, 22 (1920); *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 475-76 (1918).

prior decisions, seek vindication in state courts of their federal constitutional rights.'" *Ford* v. *Georgia*, 498 U.S. 411, 423 (1991) (quoting *Patterson*, 357 U.S. at 457-58).

The overly technical procedural bar at issue here—which was never identified by the Oregon courts until *after* this Court had ruled on the merits of Philip Morris's claim and which represents a marked departure from typical Oregon procedure—is precisely the type of novel requirement that this Court has held *cannot* foreclose a federal claim. The decision below represents a distinct departure from usual Oregon procedure in multiple respects.

First, in *State* v. *George*, 97 P.3d 656 (Or. 2004) (en banc), the Oregon Supreme Court reiterated the rule that, where the trial court rejects a proposed instruction as a matter of substantive law—and not because it finds fault with the wording of the proposed instruction—there is no need to submit a revised instruction, because it would be "an exercise in futility." *Id.* at 339. "Our requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." *Ibid.*[9] The rule applied below—that a proposed instruction must be correct even in those respects that were entirely irrelevant to the trial court's rejection of the instruction—cannot be reconciled with *George*.

At oral argument following remand from this Court, the member of the Oregon Supreme Court who authored both of its opinions in this case pointedly stated that the court did not need to be con-

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[9] See also, *e.g.*, *State* v. *Hitz*, 766 P.2d 373, 375 (Or. 1988); *State* v. *Brown*, 800 P.2d 259, 264-266 (Or. 1990) (en banc).

cerned with whether its ruling is consistent with prior opinions such as *George*, because "the United States Supreme Court wouldn't care for one second" about "[o]ur interpretation as to whether *George* is binding, useful, or irrelevant," and because this Court "assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on *George*, for the Court to assume anything different nor for you to claim anything different." App., *infra*, 181a. Rather than trying to distinguish *George* in its opinion following remand, the Oregon Supreme Court simply ignored the precedent.

Second, and relatedly, the decision below dramatically expands the "correct in all respects" rule. This case marks the first time in any reported Oregon decision that an appellate court has rejected an instruction on one subject, after the trial judge considered that subject separately at the charge conference, merely because it appeared under the same heading as a defective instruction *on an entirely distinct point of law*. Normally, the Oregon courts consider the correctness of instructions topic by topic, as the trial judge did at the charge conference.[10] Indeed, in their prior appellate decisions in this very case, the Oregon courts applied the "correct in all respects" rule only in the context of the specific subject at issue—the question whether the award had to be proportional to the harm to the plaintiff, and could

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[10] See, *e.g.*, *Bennett* v. *Farmers Ins. Co.*, 26 P.3d 785 (Or. 2001); *State* v. *Reyes-Camarena*, 7 P.3d 522 (Or. 2000) (en banc); *Hernandez* v. *Barbo Mach. Co.*, 957 P.2d 147 (Or. 1998); *Beglau* v. *Albertus*, 536 P.2d 1251 (Or. 1975) (en banc); *Owings* v. *Rose*, 497 P.2d 1183 (Or. 1972); *Brooks* v. *Bergholm*, 470 P.2d 154 (Or. 1970).

not punish for harms to non-parties. App., *infra*, 52a; *id.* at 103a-104a; 140a.

Third, although the Oregon appellate courts had three prior opportunities to identify a state-law ground for rejecting Philip Morris's constitutional claim, they never did so. To the contrary, all three prior decisions reached the merits of Philip Morris's constitutional claim. See App., *infra*, 47a, 104a-105a, 140a. That silence is telling: it is established procedure in Oregon to decide all questions of state law first, in order to avoid unnecessarily reaching federal constitutional issues. See *Massachusetts* v. *Upton*, 466 U.S. 727, 736 (1984) (per curiam) (Stevens, J., concurring in judgment) (collecting Oregon cases); see also, *e.g.*, *State* v. *Acremant*, 108 P.3d 1139, 1151 (Or. 2005) (court's "usual practice" is to "consider[] all questions of state law before reaching federal constitutional claims").

In sum, this procedural bar—fashioned only after this Court made clear that the Oregon court was wrong on the merits—is the antithesis of a "firmly established and regularly followed" procedural doctrine. *Ford*, 498 U.S. at 424; see also *Lee* v. *Kemna*, 534 U.S. 362, 380 (2002) (state-law basis for denying continuance inadequate where the "asserted procedural oversights * * * were first raised more than two and a half years after [defendant's] trial"); *Patterson*, 357 U.S. at 458 (procedural barrier applied inconsistently to the same party is not an adequate ground).

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO CLARIFY THE APPROPRIATE APPLICATION OF THE RATIO GUIDEPOST.

In May 2006, this Court granted review of the question whether the 97:1 ratio of punitive to compensatory damages in this case was constitutionally permissible. Because the Court reversed the Oregon Supreme Court on the issue of harms to non-parties and remanded the case for further proceedings, it did not reach the excessiveness issue. *Williams*, 127 S. Ct. at 1065. The Court's guidance on this important, recurring question is needed even more now than it was then.

A. The Framework Adopted And Applied By The Oregon Supreme Court Conflicts With This Court's Decisions In *BMW* And *State Farm*.

The Oregon Supreme Court acknowledged that "the second *Gore* guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case." App., *infra*, 64a. It nevertheless affirmed the $79.5 million penalty, which yielded a ratio of almost 100 to 1, because "the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio." *Id.* at 66a. The Oregon Supreme Court reaffirmed that view as recently as March 6, 2008, when it stated: "In *Williams*, we held that 'extraordinarily reprehensible' conduct on the part of the defendant may provide a basis for overriding concerns that may arise from an award that exceeds a single-digit ra-

tio." *Goddard* v. *Farmers Ins. Co.*, No. S053405, 2008 WL 599323, at *16 (Or. Mar. 6, 2008) (en banc).

The presence of aggravating reprehensibility factors alone does not override the ratio guidepost or even remove a case from the single-digit-ratio framework described in *State Farm* (much less justify the 97:1 ratio at issue here). To the contrary, the degree of reprehensibility, among other factors, helps the court to determine which single-digit multiplier is appropriate. In *State Farm*, this Court explained that normally a punitive award of four times compensatory damages "might be close to the line of constitutional impropriety." 538 U.S. at 425. However, the absence of aggravating reprehensibility factors renders *any* punitive damages award "suspect." *Id.* at 419. *State Farm* itself involved at least two aggravating reprehensibility factors—intentional deceit and a financially vulnerable victim. *See id.* at 419-20. Nevertheless, the Court suggested that any award producing a ratio of more than 1:1 would be unconstitutionally excessive on the facts of the case. *Id.* at 429.[11]

It makes no sense to consider each guidepost as an independent and sufficient factor that can "override" one or more of the others, as the Oregon Supreme Court did. Rather, the guideposts are constructs that must be considered together in assessing the excessiveness of a punitive award, and not "competitive tools," as the Oregon Supreme Court described them (App., *infra*, 65a). Reprehensibility

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[11] On remand, the Utah Supreme Court held that a 9:1 ratio was permissible after finding all five reprehensibility subfactors to have been established. *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah 2004).

may move the acceptable ratio toward the upper end of the single-digit range; it does not render the ratio guidepost inapplicable. By treating the ratio guidepost as an abstract inquiry that could be overridden by high reprehensibility, the Oregon Supreme Court's decision eliminates the "reasonable relationship" requirement and conflicts with this Court's punitive damages jurisprudence.

B. The Lower Courts Are Deeply Divided On This Question.

The Oregon Supreme Court's elimination of the "reasonable relationship" requirement directly conflicts with the approach taken by the Ninth Circuit, which assesses the *BMW* guideposts in concert with one another. That court has "discern[ed] from *BMW* and its progeny a rough framework for evaluating whether there is a reasonable relationship between the punitive damages award and the actual or likely harm associated with the wrongful conduct." *Planned Parenthood of the Columbia/Willamette Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). In that framework, the reprehensibility guidepost and the ratio guidepost play distinct roles:

> In cases where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality. *See, e.g.*, *State Farm*, 538 U.S. at 425, 123 S. Ct. 1513 (acts of bad faith and fraud warranted something closer to a 1 to 1 ratio). In cases with significant economic damages and more egregious behavior, a single-digit ratio greater than 4 to 1 might be constitutional. *See, e.g.*, *Zhang* [v. *Am. Gem Seafoods, Inc.*, 339

> F.3d 1020, 1043-44 (9th Cir. 2003)] (post-*State Farm* case upholding 7 to 1 ratio where the wrongful conduct involved significant racial discrimination); *Bains* [*LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 776-77 (9th Cir. 2005)] (post-*State Farm* case indicating that ratio between 6 to 1 and 9 to 1 would be constitutional where underlying wrongful conduct was racial discrimination). And in cases where there are insignificant economic damages but the behavior was particularly egregious, the single-digit ratio may not be a good proxy for constitutionality. *See, e.g.*, *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003) (upholding a punitive damage award with a 37 to 1 ratio of punitive damages to compensatory damages as constitutional because "defendant's behavior was outrageous but the compensable harm" was nominal and difficult to quantify).

422 F.3d at 962.

The Ninth Circuit's approach, with its appreciation that the reprehensibility analysis operates within limits set by the ratio guidepost, is irreconcilable with Oregon's, which simply discards the ratio consideration based on the possibility that the jury found the defendant's conduct to be highly reprehensible. The existence of a conflict such as this one, between a federal appellate court and the high court of one of its constituent states, is a compelling reason to grant review. See *Baldwin* v. *Alabama*, 472 U.S. 372, 374 (1985). That is because such conflicts may lead to forum shopping and will produce different results based on nothing more than whether a particular lawsuit is removable.

The majority of lower courts have agreed with the Ninth Circuit and heeded this Court's admonition that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. In particular, the Eighth Circuit, noting that "caution is required" when compensatory damages are substantial, reduced a 3.75:1 ratio to "approximately 1:1" in a smoker's personal-injury case. *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005). See also *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (although employer engaged in egregious pattern of racial discrimination, 1:1 was the maximum constitutionally-permissible ratio where compensatory damages were $600,000, which the court termed "a lot of money.").

Nonetheless, other courts agree with the Oregon Supreme Court that reprehensibility (a highly subjective criterion that is inherently present in all cases involving an award of punitive damages) may trump the ratio guidepost. These courts have expressly disregarded the single-digit limitation in cases in which none of the exceptions identified in *State Farm* was present, on the theory that high reprehensibility alone suffices to justify a double- or triple-digit ratio.

In *Mission Resources, Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301 (Tex. App.–Corpus Christi 2005, pet. granted), for example, a Texas Court of Appeals upheld a $10 million punitive award for trespass where the compensatory damages were $543,667. The court "[a]dmitted[]" that the ratio of "approximately 20 to 1 * * * exceeds the 'single-digit multipliers,' which, according to the Supreme Court, 'are more

likely to comport with due process.'" *Id.* at 319. It nevertheless upheld the award because the trespass was "highly unlawful." *Ibid.* Similarly, in *Superior Federal Bank* v. *Jones & Mackey Construction Co.*, 219 S.W.3d 643 (Ark. Ct. App. 2005), the Arkansas Court of Appeals upheld a $3.08 million punitive damages award for defamation that was 17.6 times the $175,000 compensatory damages award for that claim. The court recognized that "this ratio is greater than the single-digit ratio mentioned in *Campbell*," and therefore was "constitutionally suspect." *Id.* at 652-53. But it upheld the award simply because "a 17.6-to-1 ratio is not breathtaking." *Id.* at 653.

The Constitution does not require a "one size fits all" approach to application of the ratio guidepost. But the current level of conflict and confusion on the ratio question in the lower courts is intolerable. The bottom line is that the guidepost is not being applied in any principled or predictable manner. The Oregon Supreme Court's doctrinal holding—that the reasonable-relationship requirement can be "overridden" whenever the jury could have found the defendant's conduct to be highly reprehensible—only adds to that disarray. The need for review of that holding is no less pressing now than it was when the Court granted certiorari on this issue two years ago.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

MARCH 2008

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APPENDIX A
[Opinion of the Oregon Supreme Court (Jan. 31, 2008)]

344 Ore. 45, 176 P.3d 1255

Supreme Court of Oregon.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS,
Deceased, Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, NKA PHILIP MORRIS USA INC.,
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

(CC 9705-03957; CA A106791; SC S051805).

Argued and Submitted Sept. 11, 2007.

Decided Jan. 31, 2008.

On remand from the United States Supreme Court.*

William F. Gary, of Harrang Long Gary Rudnick P.C., Eugene, argued the cause and filed the brief for petitioner on review. With him on the brief were Sharon A. Rudnick, Eugene, and James E. Mountain, Jr., Portland.

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* *Philip Williams USA v. Williams*, 549 U.S. ----, 127 S.Ct. 1057, 1065, 166 L.Ed.2d 940 (2007).

James S. Coon, of Swanson, Thomas & Coon, Portland, argued the cause and filed the responses for respondent on review. With him on the responses were Raymond F. Thomas, Portland, Robert S. Peck, Center for Constitutional Litigation PC, Washington D.C., William A. Gaylord, of Gaylord Eyerman Bradley PC, Portland, Charles S. Tauman, Portland, Kathryn H. Clarke, Portland, and Maureen Leonard, Portland.

Steven C. Berman, of Stoll Stoll Berne Lokting & Shlachter P.C., Portland, filed the brief for amicus curiae Oregon Trial Lawyers Association. With him on the brief was David F. Sugerman, Portland.

Janet A. Metcalf, Assistant Attorney General, Salem, filed the brief for amicus curiae State of Oregon. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Before DE MUNIZ, Chief Justice, and GILLETTE, DURHAM, WALTERS, and LINDER, Justices.**

GILLETTE, J.

This matter is before us on remand from the United States Supreme Court. Previously, this court held (among other things) that certain federal constitutional limitations constraining punitive damage awards did not require a trial court to instruct a jury that it was not to use an award of punitive damages to punish a defendant for harms to persons who were not parties to the litigation. *Williams v. Philip Mor-*

** Balmer and Kistler, JJ., did not participate in the consideration or decision of this case.

ris Inc., 340 Or. 35, 51-54, 127 P.3d 1165 (2006). On certiorari, the United States Supreme Court vacated that opinion and remanded. *Philip Morris USA v. Williams*, 549 U.S. ----, 127 S.Ct. 1057, 1065, 166 L.Ed.2d 940 (2007). The Court concluded that the Due Process Clause of the Fourteenth Amendment prohibits the state from using punitive damages to punish for harms to nonparties, and that states must prevent punitive damages from being misused in that way. 549 U.S. at ----, 127 S.Ct. at 1063, 1065. On remand, we are called upon to reconsider and reassess our earlier holding, which arose in the context of the trial court's refusal to give a particular proposed jury instruction that defendant had requested. Having reconsidered and reassessed the issue, we now conclude that the proposed jury instruction at issue here also was flawed for other reasons that we did not identify in our former opinion. We therefore reaffirm this court's prior conclusion that the trial court did not err in refusing to give the instruction. We otherwise reaffirm our prior opinion in all respects.

Before we turn to the facts and procedural posture of this particular case, we first summarize the legal context in which it arose. The issues in this case revolve around federal constitutional limitations on punitive damage awards. Those constitutional limitations derive from the Due Process Clause of the Fourteenth Amendment. *See Philip Morris*, 549 U.S. at ----, 127 S.Ct. at 1060; *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (all illustrating proposition). In those cases, the Supreme Court has held that states legitimately may use punitive damages to

punish and to deter wrongdoing by defendants in tort cases. *E.g., Philip Morris,* 549 U.S. at ----, 127 S.Ct. at 1062. However, the Court also has held that the amount of punitive damages that a jury awards cannot be arbitrary; the jury's discretion must be limited. Otherwise, defendants will not have adequate notice of potential sanctions, the punishments may be arbitrary, and large punitive damage awards may force one state's policy choices onto other states. *Id.* For those reasons, the United States Constitution requires both procedural and substantive limits on punitive damage awards. *Id.*

We turn to the facts of this case. The plaintiff, Mayola Williams, is the widow of Jesse Williams, a smoker who died of lung cancer. Plaintiff, as personal representative of Jesse Williams's estate, sued defendant Philip Morris Inc., asserting that Philip Morris's fraud and negligence caused Jesse Williams's death.

The parties do not dispute this court's prior overview of the evidence offered at trial, which was presented in the light most favorable to plaintiff. *See Williams,* 340 Or. at 38-43, 127 P.3d 1165 (describing facts of case). Briefly, the evidence permitted the jury to conclude that Philip Morris and other tobacco companies had known of the carcinogenic dangers of smoking since at least the 1950s. *Id.* at 41, 127 P.3d 1165. Nevertheless, Philip Morris, operating in conjunction with the rest of the tobacco industry, carried out an extensive publicity campaign, from the 1950s into the 1990s, to convince the public that doubts remained about whether smoking actually was dangerous to one's health. *Id.* at 40, 127 P.3d 1165. No legitimate controversy existed about whether smoking was harmful to health, although Philip Morris

and the rest of the tobacco industry strove to persuade the public otherwise. *Id.* at 41-42, 127 P.3d 1165 (issuing press releases, cultivating opinion leaders, using advertising power to seek favorable treatment from the media, etc.). Philip Morris and the rest of the tobacco industry also fostered the sham impression that they were themselves vigorously investigating the health effects of smoking when, in actuality, their research institution avoided doing research on that question. *Id.* at 40-41, 127 P.3d 1165.

The jury further could have concluded that this program of disinformation succeeded in tricking Jesse Williams, who smoked from the early 1950s until he died in 1997. He was highly addicted to nicotine, eventually smoking three packs of cigarettes – primarily Philip Morris's Marlboro brand – a day. *Id.* at 38, 127 P.3d 1165. Williams resisted his family's efforts to convince him to quit smoking, because he believed media representations that the dangers of smoking were overstated or nonexistent. *See id.* at 39, 127 P.3d 1165 (presented with article about dangers of smoking, Williams had found "published assertions that cigarette smoking was not dangerous"); *id.* at 42, 127 P.3d 1165 (Williams rejected arguments to quit, because "he had learned from watching television that smoking did not cause lung cancer"). When Williams was diagnosed with lung cancer, however, he asserted that the "cigarette people" had betrayed him by "lying" to him. *Id.* at 39, 127 P.3d 1165 (internal quotation marks and citation omitted). Williams was dead within six months after the cancer was discovered. *Id.*

Near the end of trial, the parties offered proposed jury instructions. One instruction submitted by

Philip Morris was its proposed jury instruction No. 34, dealing with punitive damages. Among other things, that instruction provided:

> "The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

(The complete text of the instruction, which was three-and-a-half pages long, is reprinted as an Appendix to this opinion.)

The trial court analyzed the proposed jury instructions line-by-line with the parties, during which time Philip Morris argued that the consider-but-don't-punish part of proposed jury instruction No. 34 was needed to ensure that this plaintiff did not receive punitive damages that should be awarded (if they were to be awarded at all) to other plaintiffs. After the trial court had reviewed Philip Morris's proposed jury instruction No. 34 together with plaintiff's proposed jury instruction on punitive damages-the transcript of that part of the trial court's analysis is 50 pages long-the trial court declined to give proposed jury instruction No. 34 as proffered.[1]

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[1] That is, the trial court did not give proposed jury instruction No. 34 in the form in which Philip Morris proffered it. The trial

The jury returned a verdict for plaintiff. The jury's unadjusted award was $821,485.50 in compensatory damages and $79.5 million in punitive damages. The trial court, among other things, reduced the punitive damage award to $32 million. *Williams*, 340 Or. at 44, 127 P.3d 1165.

Plaintiff and Philip Morris both appealed. The Court of Appeals reversed on plaintiff's appeal, concluding that the trial court should not have reduced the punitive damages award. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 72, 48 P.3d 824, *adh'd to on recons.*, 183 Or.App. 192, 51 P.3d 670 (2002). The Court of Appeals affirmed on Philip Morris's cross-appeal, concluding that the trial court did not err in refusing to give Philip Morris's proposed jury instruction No. 34. 182 Or.App. at 63-64, 48 P.3d 824. This court denied review. *Williams v. Philip Morris Inc.*, 335 Or. 142, 61 P.3d 938 (2002).

The United States Supreme Court then granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case to the Court of Appeals for further consideration in light of the Supreme Court's opinion in *Campbell. Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). After an extended analysis on remand, the Court of Appeals again reached the same conclusions that it had reached in its earlier opinion. *Williams v. Philip Morris, Inc.*, 193 Or.App. 527, 530, 92 P.3d 126 (2004). Specifically, the court concluded that the $79.5 million punitive damage award did not violate due process. *Id.* at 563, 92 P.3d 126. The court also

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court did, however, incorporate some concepts from Philip Morris's proposed jury instruction No. 34 into its final instructions to the jury.

rejected Philip Morris's argument that the trial court erred in refusing to give proposed jury instruction No. 34. *Id.* at 555-57, 92 P.3d 126.

This court then allowed defendant's petition for review, and affirmed the decision of the Court of Appeals. *Williams*, 340 Or. at 38, 127 P.3d 1165. This court concluded, also after an extensive analysis, that the $79.5 million punitive damage award comported with federal due process. *Id.* at 54-64, 127 P.3d 1165. As pertinent to the present proceeding, this court also rejected Philip Morris's argument that the trial court should have given proposed jury instruction No. 34. Philip Morris had argued that *Campbell* prohibited courts from "'adjudicat[ing] the merits of other parties' hypothetical claims against a defendant,'" because of the "'possibility of multiple punitive damage awards for the same conduct[.]'" *Id.* at 52, 127 P.3d 1165 (quoting *Campbell*, 538 U.S. at 423, 123 S.Ct. 1513). This court concluded, however, that those quotations from *Campbell* were taken out of context. "The [full] quote referred only to *dissimilar* acts and dissimilar claims; the Court intended to prohibit a punitive damage award from becoming a referendum on a corporate defendant's general behavior as a citizen." *Id.* at 52, 127 P.3d 1165 (emphasis in original). But, this court stated, "evidence of *similar* conduct against other parties may be relevant to a punitive damage award." *Id.* at 53, 127 P.3d 1165 (emphasis in original). Because proposed jury instruction No. 34 therefore incorrectly stated federal requirements of due process of law (at least as this court understood it), this court concluded that

the trial court did not err in refusing to give the instruction. *Id.* at 53-54, 127 P.3d 1165.[2]

On certiorari, the United States Supreme Court reached a different conclusion. *Philip Morris USA*, 549 U.S. at ----, 127 S.Ct. at 1057. The terms of the Court's decision are important to understanding the issues presented to this court. We therefore review that opinion in some detail.

After reviewing the procedural history of the case, the Court summarized the limits that due process imposes on punitive damages awards. *Id.* at 1060-63. Although the United States Constitution requires both procedural and substantive limits on punitive damage awards, *id.* at 1062, in this case the Court only addressed the procedural limits. *Id.* at 1063. As the Court explained, "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* The Court identified three reasons for that conclusion: First, a defendant cannot effectively defend against claims of injuries to nonparties. *Id.* Second, permitting a punitive damages award to punish for harm to nonparties "would add a near standardless

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[2] Plaintiff also had argued, in the alternative, that the refusal to give proposed instruction No. 34 was not error, because that instruction misstated other points of law. Given this court's holding that the instruction was erroneous with respect to federal due process law, however, this court did not need to address those alternative arguments. Now, in light of the remand from the United States Supreme Court, we must consider those alternative reasons for affirmance.

dimension to the punitive damages equation," with speculation about the nonparties magnifying the risk of arbitrary treatment. *Id.* And, third, the Court found that no authority existed to permit using punitive damages to punish for harm to nonparties. *Id.*

That said, the Court also went on to acknowledge that harm to nonparties (to the extent that it exists) may play a role in the punitive damages calculus in the sense that it is relevant to showing the degree of reprehensibility of a defendant's conduct. *Id.* at 1063-64. The Court distinguished, however, between legitimate use of evidence of such harm to establish reprehensibility and illegitimate use of that evidence to punish defendant for harm it caused to nonparties. As the Court explained:

> "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible * * *. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties."

Id. at 1064. The Court repeated the same point later in its opinion:

> "We have explained why we believe the Due Process Clause prohibits a State's inflicting punishment for harm caused strangers to the litigation. At the same time we recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury conse-

> quently may take this fact into account in determining reprehensibility."

127 S.Ct. at 1065 (citation omitted).

All in all, the Court concluded, the risks of unfairness inherent in punitive damage awards mean that state courts must "provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 1064. The Court noted that that distinction raised practical difficulties for reviewing courts, difficulties that should be met by appropriate procedures:

> "How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others? Our answer is that state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring. In particular, we believe that where the risk of that misunderstanding is a significant one-because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury-a court, upon request, must protect against that risk. Although the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases."

Id. at 1065 (emphases in original).

Having explained the general principles of law, the Court then applied those principles to this case.

"The instruction that Philip Morris said the trial court should have given distinguishes between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Id.* at 1064. The Court reviewed this court's opinion in *Williams,* 340 Or. at 35, 127 P.3d 1165, and concluded that that opinion permitted direct punishment for harm to others, without limiting the use of such harm to determine reprehensibility. 127 S.Ct. at 1064-65. For that reason, the Court vacated this court's opinion and remanded for further proceedings. The Court specifically explained its conclusion, and the nature of the remand, as follows:

> "As the preceding discussion makes clear, we believe that the Oregon Supreme Court *applied the wrong constitutional standard* when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can *apply the standard we have set forth.* Because the application of this standard *may* lead to the need for a new trial, or a change in the level of the punitive damages award, we shall not consider whether the award is constitutionally 'grossly excessive.'"

Id. at 1065 (emphases added).

Under the Supreme Court's remand, then, it is our task to apply the constitutional standard set by the Supreme Court in our consideration of the sole issue raised by Philip Morris, *viz.,* whether the trial court erred in refusing to give proposed jury instruc-

tion No. 34.[3] As we shall explain, however, there is a preliminary, independent state law standard that we must consider, before we address the constitutional standard that the United States Supreme Court has articulated.

A state court decision like the decision of the trial judge in this case to refuse to give proposed jury instruction No. 34 may be affirmed, without reaching the federal question, if there is an independent and adequate state ground for doing so. *See, e.g., Osborne v. Ohio,* 495 U.S. 103, 123, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) (Ohio Supreme Court, applying state law, had held that defendant had waived due process challenge by failing to object to jury instructions at trial: "We have no difficulty agreeing with the State that [defendant's] counsel's failure to urge that the court instruct the jury on scienter constitutes an independent and adequate state-law ground preventing us from reaching [defendant's] due process contention on that point."). We believe that this is such a case, *i.e.,* one resting on an independent and adequate state ground for affirming the trial judge's ruling.[4]

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[3] Defendant did not preserve any issue as to the instructions that the trial court did give. *See Williams,* 340 Or. at 54, 127 P.3d 1165 (so explaining).

[4] Put differently, we understand the Court's use of the phrase, "upon request," *Philip Morris USA,* 127 S.Ct. at 1065, to be an acknowledgment of the authority of states to place reasonable procedural requirements on any request for instructions, including requests like the one at issue here. Our treatment of this topic in the pages that follow is based on that understanding, and on the belief that Oregon's rule concerning the correctness of requested instructions is a reasonable allocation of responsibility to parties to a jury trial.

Under Oregon law, there are two different types of error respecting jury instructions: (1) error in the failure to give a proposed jury instruction, and (2) error in the jury instructions that actually were given. *See Bennett v. Farmers Ins. Co.*, 332 Or. 138, 152-53, 26 P.3d 785 (2001) (so indicating). As noted, Philip Morris failed to preserve for our review any claim that the jury instructions actually given were erroneous. *See Williams*, 340 Or. at 54, 127 P.3d 1165 (unpreserved in Court of Appeals). This case, therefore, involves only the *failure to give* a proposed jury instruction.

In Oregon, there is a well-understood standard governing claims of error respecting a trial judge's refusal to give a proffered instruction: An appellate court will not reverse a trial court's refusal to give a proposed jury instruction, unless the proposed instruction was "clear and correct in all respects, both in form and in substance, and * * * altogether free from error." *Beglau v. Albertus*, 272 Or. 170, 179, 536 P.2d 1251 (1975) (citations omitted); *see also Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 106, 957 P.2d 147 (1998) ("there is no error [in refusing to give a proposed instruction] if the requested instruction is not correct in all respects"); *Owings v. Rose*, 262 Or. 247, 258, 497 P.2d 1183 (1972) ("The trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors."). The effect of that standard is to require that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give. That means that, in the case of the refusal to give an instruction-and we repeat that that is all that is at stake here-the party seeking a particular instruction must be correct respecting the rule of law stated in

the instruction. In this case, the United States Supreme Court has opined that there is a risk that a jury will be confused about how to take into account harm that the defendant may have caused to others. A trial court must, "upon request," protect against that risk. But, as with any other request for an instruction, the question that we first must address is whether the rest of Philip Morris's requested instruction correctly stated Oregon law. It is not enough, for example, to offer a proposed instruction that is correct in part and erroneous in part, leaving the trial court to solve the problem for itself. *Beglau*, 272 Or. at 179, 536 P.2d 1251. We also note, in passing, that asking the court to give a multiple-page instruction – essentially placing all the party's eggs in one instructional basket – involves a significant danger that the proffered instruction will be erroneous in some aspects. We turn to an examination of proposed instruction No. 34 in light of the standard just discussed.

Proposed instruction No. 34 addressed a range of issues relating to punitive damages, and plaintiff contends that it was erroneous in a number of ways that are unrelated to the issues addressed by the United States Supreme Court. Among other things, plaintiff contends that proposed instruction No. 34 would have instructed the jury erroneously that (1) the Oregon statutory factors that the jury must find in order to justify a punitive damage award were discretionary, when they are mandatory; and (2) one factor to be considered in awarding punitive damages was Philip Morris's "motiv[ation]" to make "illicit profits." As we will explain, we agree with plaintiff on both points.

First, however, we must consider an initial objection, because Philip Morris contends that plaintiff cannot now raise those alternative reasons to affirm the trial court's judgment. The trial court reviewed the proposed jury instructions line-by-line, but Philip Morris claims that plaintiff failed to make the additional objections to the trial court on which it now relies. For that reason, Philip Morris asserts, the trial court cannot be affirmed as having been "right for the wrong reasons." We reject that argument, because the plaintiff need not have made any objection at all in order for the trial court to have been legally justified in rejecting the instruction, if it did not correctly state the law. The correctness of the instruction, in light of the factual record that both parties had a full opportunity to develop, was purely a legal issue, and the burden was on defendant to offer a legally sufficient instruction. If defendant did not do so, then there was a legally correct justification for the trial court's decision to refuse the proffered instruction. Under such circumstances, the trial court's ruling should be sustained.[5]

Finally, before we examine what proposed instruction No. 34 actually would have done, we examine what it appears that defendant intended the instruction to accomplish. Oregon law provides that, in product liability actions (such as the present case), punitive damages should be awarded (if at all) based

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[5] We also reject defendant's assertion that any further or different effort by it respecting the instruction would have been "futile." The record throughout belies that idea: The trial judge was solicitous of, and at pains to consider, the views of both parties respecting instructions.

on seven criteria. ORS 30.925(2), which sets out that requirement, provides:

> "Punitive damages, if any, shall be determined and awarded based upon the following criteria:
>
> "(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> "(b) The degree of the defendant's awareness of that likelihood;
>
> "(c) The profitability of the defendant's misconduct;
>
> "(d) The duration of the misconduct and any concealment of it;
>
> "(e) The attitude and conduct of the defendant upon discovery of the misconduct;
>
> "(f) The financial condition of the defendant; and
>
> "(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's * * *."[6]

Proposed jury instruction No. 34 restated most of the foregoing factors often drastically. It provided:

> "(2) The size of the punishment may appropriately reflect the degree of reprehensibility

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[6] The parties agreed at trial that the jury did not need to be instructed about subsection (g), because no evidence had been presented on that point.

of the defendant's conduct-that is, how far the defendant has departed from accepted societal norms of conduct. Factors that you may find to bear upon the degree of reprehensibility include:

"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct, beyond the harms generally understood to inhere in cigarette smoking;

"(b) The degree of the defendant[']s awareness of that likelihood;

"(c) The degree to which the defendant was motivated by a desire to obtain illicit profits from its misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(3) In determining how much punishment is necessary to achieve the goal of appropriate deterrence, you may consider the extent to which the obligation to pay compensatory damages will suffice to cause defendant and others to refrain from similar misconduct in the future.

"(4) Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. However, you may not punish the defendant simply because it is large. Rather, the paramount consideration remains the degree of reprehensibility of any misconduct and the extent of any harm caused by such misconduct."

We turn to plaintiff's critique of that proposed instruction. Plaintiff first argues that proposed jury instruction No. 34 incorrectly indicates that the statutory factors are discretionary and nonexclusive – "[f]actors that you *may* find to bear * * * *include*" (emphasis added) – while ORS 30.925(2) actually makes those factors mandatory and exclusive – "*shall* be determined and awarded based upon the following criteria." (Emphasis added.) Philip Morris offers no argument against plaintiff's proposed reading of the statute.

We agree with plaintiff that proposed jury instruction No. 34 is defective in the way that plaintiff argues. ORS 30.925(2) uses the word "shall," which generally indicates that something is mandatory. *See, e.g., Preble v. Dept. of Rev.*, 331 Or. 320, 324, 14 P.3d 613 (2000) (so noting). The legislature's instruction that any punitive damage award "shall be determined and awarded based upon the following criteria" thus limited the scope of the jury's authority to the list that followed. Altering that list in a jury instruction (as defendant proposed to do) would therefore fly in the face of the statute. Plaintiff might have a constitutional right to a further instruction of the kind suggested by the United States Supreme Court in *Williams*, but nothing in that right negated the trial court's duty to follow ORS 30.925(2) in all other respects. To have given the instruction in the form proffered by defendant thus would have been error under Oregon law.

Plaintiff also maintains that proposed jury instruction No. 34 misstates one of the statutory factors in ORS 30.925(2). While the proposed jury instruction would have permitted the jury to consider "[t]he degree to which the defendant was motivated

by a desire to obtain illicit profits from its misconduct," ORS 30.925(2)(c) actually directs the jury to consider "[t]he profitability of the defendant's misconduct." That is, proposed jury instruction No. 34 focuses on *motive* or *intent,* while the statute instead focuses on *outcome.* Again, to have given the instruction in the form proffered by defendant would have been error under Oregon law.

On remand, Philip Morris makes no argument that proposed jury instruction No. 34 accurately states the law in that respect. In the prior briefing in this case, however, Philip Morris had addressed that issue in part. As to the words "illicit profits," Philip Morris had contended that those words were necessary to "prevent[ ] the jury from relying on [Philip Morris's] 'profits' – without regard to whether they were derived from lawful or unlawful conduct-as an indirect way of punishing lawful cigarette sales." In support, Philip Morris cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 441-42, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), in which the Court stated that "it would be unrealistic to assume that all of [defendant's] sales of [a competing product] would have been attributable to its misconduct in using a photograph of [plaintiff's product] in its initial advertising materials." *Id.* at 442, 121 S.Ct. 1678.

Again, we agree with plaintiff that Philip Morris's justification fails, and proposed jury instruction No. 34 misstated the law. While the statutory factor requires an examination of the profitability of the misconduct-an objective fact-proposed jury instruction No. 34 instead focuses on Philip Morris's subjective state of mind regarding profit – *i.e.,* whether Philip Morris was "motivated by a desire" to profit

from misconduct. And, while ORS 30.925(2)(c) directs the jury to consider all "profitability of the misconduct," the proposed jury instruction permits the jury to consider only "*illicit* profits from its misconduct" (emphasis added), thus implicitly directing the jury to try to subdivide the profits from misconduct into legal and illegal parts – a circular inquiry, at best.

We see no merit to Philip Morris's argument that the jury instruction needed to refer to "illicit profits" to keep the jury from considering *lawful* profits, because that simply misreads the statutory factor. ORS 30.925(2)(c) does not allow the jury to consider profitability generally – it instead limits the jury's inquiry to a consideration of "the profitability *of the misconduct*." (Emphasis added.) But, once the profitability of the misconduct is identified, it makes no difference whether it was otherwise licit (not against law) or illicit (against law). Either way, it was relevant to the jury's inquiry.

We think that it follows from the foregoing analysis that, even assuming that proposed jury instruction No. 34 clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly. Accordingly, the trial court did not err in refusing to give it. Our previous conclusion to that effect is reaffirmed. And, because our ruling respecting the trial judge's refusal to give proposed jury instruction No. 34 was correct, it follows that the remaining aspects of the judgment against defendant should be reaffirmed. That latter point is true, not only because reconsidering the remaining aspects of the judgment would lie outside the scope of the Supreme Court's remand, but also because defendant has not advanced any separate arguments for doing otherwise. We there-

fore reaffirm our previous decision in this case in all particulars.

The court's decision in *Williams v. Philip Morris Inc.*, 340 Or. 35, 127 P.3d 1165 (2006), is adhered to. The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

APPENDIX

The text of Philip Morris's proposed jury instruction No. 34 reads as follows (emphases in original):

"DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 34

"PUNITIVE DAMAGES – PRODUCTS LIABILITY

"I will now instruct you on punitive damages. If you find that Marlboro cigarettes are a defective product or that the defendant is guilty of negligence or fraud, you must consider whether to award punitive damages.

"Punitive damages may be imposed only if the plaintiff has satisfied you by clear and convincing evidence that the defendant, in engaging in the conduct that caused Jesse Williams' death, has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

"Clear and convincing evidence is evidence of such weight and quality that, even when considered in light of any conflicting evidence, leaves you with a firm conviction that the truth of the matter in question is highly probable.

"You have the discretion to award, or not to award, punitive damages. In the exercise of that discretion, you may consider whether the imposition of punitive damages is necessary to punish and deter similar misconduct by defendant and others in the future.

"In considering punitive damages, I remind you that the sale of cigarettes has in itself been at all times a lawful activity in this State. You are not to punish the defendant on account of the propensity of cigarettes to cause illness and death for some of those who smoke them, or the defendant's knowledge of that propensity, except to the extent that the risks from smoking were not a matter of general public knowledge but were known to and unlawfully misrepresented by the defendant.

"In determining whether the defendant's conduct is such as to subject it to punitive damages, you must not allow your decision to be influenced by the defendant's financial condition, corporate status, or place of business.

"If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

"(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suf-

fered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

"[ALTERNATIVE]

"(1) You are not to punish the defendant for the impact of its conduct on individuals in other states.

"(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct – that is, how far the defendant has departed from accepted societal norms of conduct. Factors that you may find to bear upon the degree of reprehensibility include:

> "(a) The likelihood at the time that serious harm would arise from the defendant's misconduct, beyond the harms generally understood to inhere in cigarette smoking;
>
> "(b) The degree of the defendant[']s awareness of that likelihood;
>
> "(c) The degree to which the defendant was motivated by a desire to obtain illicit profits from its misconduct;
>
> "(d) The duration of the misconduct and any concealment of it;

"(3) In determining how much punishment is necessary to achieve the goal of appropriate deterrence, you may consider the extent to which the obligation to pay compensatory damages will suffice to

cause defendant and others to refrain from similar misconduct in the future.

"(4) Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. However, you may not punish the defendant simply because it is large. Rather, the paramount consideration remains the degree of reprehensibility of any misconduct and the extent of any harm caused by such misconduct."

APPENDIX B
[Opinion of the Oregon Supreme Court (Feb. 2, 2006)]

340 Ore. 35, 127 P.3d 1165

Supreme Court of Oregon.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS,
Deceased, Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, NKA PHILIP MORRIS USA INC.,
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

(CC 9705-03957; CA A106791; SC S51805).

Argued and Submitted May 10, 2005.
Decided Feb. 2, 2006.

On review from the Court of Appeals.*

William F. Gary, of Harrang Long Gary Rudnick P.C., Eugene, argued the cause and filed the briefs

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* Appeal from Multnomah County Circuit Court, Anna J. Brown, Judge. 182 Or.App. 44, 48 P.3d 824 (2002), *adh'd to on recons.*, 183 Or.App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002), *vac'd and rem'd*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003), *on remand*, 193 Or.App. 527, 92 P.3d 126 (2004).

for petitioner on review. With him on the briefs were Sharon A. Rudnick and James E. Mountain, Jr.

James S. Coon, of Swanson, Thomas & Coon, Portland, argued the cause and filed the briefs for respondent on review. With him on the surreply brief were Raymond F. Thomas, Portland, Robert S. Peck, of Center for Constitutional Litigation PC, pro hac vice, Washington, D.C., William A. Gaylord, of Gaylord Eyerman Bradley PC, Portland, Charles S. Tauman, Portland, Kathryn H. Clarke, Portland, and Maureen Leonard, Portland.

Thomas W. Brown, of Cosgrave Vergeer Kester LLP, Portland, filed the briefs for amicus curiae Associated Oregon Industries.

Thomas W. Sondag, of Lane Powell PC, Portland, filed the brief for amicus curiae Chamber of Commerce of the United States of America.

Steven C. Berman, of Stoll Stoll Berne Lokting & Shlachter P.C., Portland, filed the brief for amici curiae Alliance for Lung Cancer Advocacy, Support and Education; American Cancer Society (Greatwest Division); American Heart Association; American Lung Association of Oregon; and Tobacco Free Coalition of Oregon.

David F. Sugerman, of Paul & Sugerman, PC, Portland, filed the brief for amici curiae Oregon Trial Lawyers Association and Oregon Consumer League.

Charles F. Adams and James A. Zehren, of Stoel Rives LLP, Portland, filed the brief for amicus curiae Oregon Business Association.

Before CARSON, Chief Justice,** and GILLETTE, DURHAM, RIGGS, and De MUNIZ,*** Justices.****

GILLETTE, J.

This tort case arose out of the death of Jesse Williams, a smoker, who died of lung cancer. Plaintiff Mayola Williams is the widow of Jesse Williams and personal representative of his estate. Plaintiff sued defendant Philip Morris Inc. for, *inter alia*, negligence and fraud, asserting a causal connection between Jesse Williams's smoking habit and his death. A jury found for plaintiff on both causes of action. The jury awarded both economic and noneconomic damages; it also awarded plaintiff punitive damages of $79.5 million. The issue before us is whether that punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court of Appeals concluded that it did not. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 48 P.3d 824 (2002) (*Williams I*), *adh'd to on recons.*, 183 Or.App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002), *vac'd and rem'd*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003), *on remand*, 193 Or.App. 527, 92 P.3d 126 (2004) (*Williams II*). For the reasons that follow, we agree.

I. FACTS

Because the jury ruled in favor of plaintiff, we state all facts in the light most favorable to plaintiff. *See Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 556, 17 P.3d 473 (2001) ("[W]hen reviewing a punitive

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** Chief Justice when case was argued.

*** Chief Justice when decision was rendered.

**** Balmer and Kistler, JJ., did not participate in the consideration or decision of this case.

damages award for excessiveness, the reviewing court must view the facts in the light most favorable to the jury's verdict if there is evidence in the record to support them."). Because the parties do not dispute the way that the Court of Appeals framed the facts, we quote extensively from that court's opinions.

Jesse Williams was a lifelong smoker who eventually died of lung cancer. The cancer was caused by Williams's smoking.

> "From the early 1950s until his death from a smoking-related lung cancer in 1997, Williams smoked [Philip Morris]'s cigarettes, primarily its Marlboro brand, eventually developing a habit of three packs a day. At that point, he spent half his waking hours smoking and was highly addicted to tobacco, both physiologically and psychologically. Although, at the urging of his wife and children, he made several attempts to stop smoking, each time he failed, in part because of his addiction. Despite the increasing amount of information that linked smoking to health problems during that 40-year period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding published assertions that cigarette smoking was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt be-

> trayed, stating 'those darn cigarette people finally did it. They were lying all the time.' He died about six months after his diagnosis."

Williams II, 193 Or.App. at 530-31, 92 P.3d 126.

Plaintiff based her fraud claim against Philip Morris on a 40-year publicity campaign by Philip Morris and the tobacco industry to undercut published concerns about the dangers of smoking. *Id.* at 531, 92 P.3d 126. Philip Morris and the tobacco industry had known for most of those 40 years, if not all of them, that smoking was dangerous. *Id.* Nevertheless, they tried to create in the public mind the impression that there were legitimate reasons to doubt the danger of smoking. *Id.* Philip Morris and the tobacco industry did so to give smokers a reason to keep smoking (or, perhaps more accurately, to undermine one of the main incentives for smokers to stop smoking). *Id.*

The Court of Appeals summarized the evidence regarding the campaign as follows:

> "The industry established its strategy and began developing its public image in response to a decline in cigarette sales in 1953 that was the apparent result of studies that showed that cigarette tar could cause cancer in mice and that established the existence of statistical correlations between smoking and lung cancer. The first public joint effort by the industry occurred in January 1954, when [Philip Morris] and other tobacco companies published a joint statement in 448 newspapers throughout the country. In that statement, among other things, they announced

the creation of the Tobacco Industry Research Committee (TIRC), one of whose stated goals was to conduct research into 'all phases of tobacco use and health.' In 1964, the year of the Surgeon General's report on the hazard of smoking to health, the industry divided the TIRC into two parts, one of which, the Council on Tobacco Research (CTR), continued to support scientific research. The other part, named the Tobacco Institute, focused on public relations and lobbying.

"Between 1954 and the 1990s, those organizations developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales. The individual tobacco companies, including [Philip Morris], were part of the organizations and acted in cooperation with them. At first, the industry publicly denied that there was a problem; for example, in the 1950s and early 1960s, [Philip Morris]'s officials told the public that [Philip Morris] would 'stop business tomorrow' if it believed that its products were harmful. For most of that period, however, the industry did not attempt to refute the scientific information directly; rather, it tried to find ways to create doubts about it. The industry's goal was to create the impression that scientists disagreed about whether cigarette smoking was dangerous, that the industry was vigorously conducting research into the issue, and that a definitive answer would not be possible until that research was complete. As one of

[Philip Morris]'s vice-presidents explained in an internal memo, the purpose was to give smokers a psychological crutch and a self-rationale that would encourage them to continue smoking. A Tobacco Institute internal memorandum similarly described the industry's purpose to provide smokers 'ready-made credible alternatives' to the evidence of the dangers of smoking.

"Both the industry as a whole and [Philip Morris] acted consistently with those purposes. Among other things, they avoided developing contradictory information. Despite the industry's nominal emphasis on the need for further research, the CTR designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements, required more research. To the extent that [Philip Morris] conducted research on that issue independently of the CTR, it did so in a European laboratory that it purchased, and it was careful to avoid preserving records of the results in this country. [Philip Morris]'s director of research in the late 1970s and 1980s explained to a subordinate that his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it. The jury could also have found that there was a 'gentleman's agreement' not to conduct research beyond what the CTR did. The primary purpose of the CTR's research was to provide expert witnesses for congressional hearings and lawsuits, not to determine the relationship be-

tween smoking and disease. The CTR's lawyers, rather than its scientists, established its research priorities; developing accurate information on the biological effects of smoking was not one of the lawyers' priorities.

"The jury could have found that, throughout this period of time, [Philip Morris] and the other tobacco companies actually had little doubt that cigarette smoking was causally related to a number of diseases. In 1958, three British researchers found that the American tobacco scientists with whom they spoke believed that cigarette smoke could cause cancer. In 1961, [Philip Morris]'s director of research stated that cigarette smoke contained so many carcinogens that the best that the company could do was to reduce their amounts. Internal company memoranda agreed and suggested that it could not admit those facts publicly because of adverse legal consequences. At least by the 1970s, there was absolutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, [Philip Morris] continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject.

"The jury could also have found that [Philip Morris] recognized both that nicotine was addictive and that its addictive effect was the primary reason that people continued to smoke. [Philip Morris] spent considerable effort discovering ways to deliver the

optimal dose of nicotine in each cigarette without actually adding nicotine to its product. It also concluded that, because of nicotine's addictive effect, smoking cessation programs and technologies would be unlikely to work without significant behavioral therapy. In its view, providing smokers a reason to believe that there were serious doubts that tobacco was harmful would discourage smokers from making the effort that was necessary to quit smoking.

"Also, the jury could have found that [Philip Morris] and the industry used a large number of methods to create the public impression of a legitimate controversy, despite the lack of supporting scientific evidence. They issued press releases, influenced the content of apparently neutral articles, cultivated opinion leaders, attempted to use their advertising power to get favorable treatment from the print media, and appeared on commercial and public television to put forth that message. Those individuals who spoke for [Philip Morris] and the industry emphasized that the evidence concerning the dangers of smoking was primarily based on statistical relationships, and they argued that there was no proof that a specific component of tobacco smoke caused a specific disease. Even after the early 1990s, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking. The in-

> dustry, including [Philip Morris], also continued to deny that cigarette smoking was addictive and publicized that message throughout the country, including Oregon."

Id. at 531-34, 92 P.3d 126.

Philip Morris and the tobacco industry intended to deceive smokers like Williams, and it did in fact deceive him.

> "As a smoker, Williams was one of the intended recipients of the industry's message, and, in fact, the jury could have found that he received its message and relied on its representations. [The jury further could have found that t]hose representations affected his decision to continue smoking and not to make greater efforts to overcome his addiction. When his family urged him to stop smoking, he responded that he had learned from watching television that smoking did not cause lung cancer. After his diagnosis, he blamed the 'cigarette people' for betraying him—which, given his exclusive use of [Philip Morris]'s products, must at least have included [Philip Morris]. The jury could have found on the evidence before it that, as a result of [Philip Morris]'s representations, Williams suffered his fatal lung cancer. The jury also could have found that Williams was one of thousands of Oregonians who received [Philip Morris]'s message, acted on it, and, like him, suffered cancer or other diseases as a result."

Id. at 534, 92 P.3d 126.

Furthermore, Philip Morris also deceived other smokers in Oregon:

> "Although a tobacco industry survey indicated that 85 percent of smokers wished that they had never started smoking, [Philip Morris] concealed information that the addictive effects of nicotine made it difficult for them to stop without significant assistance. The fraudulent statements from [Philip Morris] and the rest of the industry reinforced those addictive effects by giving smokers a reason not to make the necessary effort to break the addiction. The jury could [have found] on this record that [Philip Morris]'s public relations campaign had precisely the effect that [Philip Morris] intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It is also reasonably inferable from the evidence that [Philip Morris]'s products, used as [Philip Morris] intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences."

Williams I, 182 Or.App. at 66-67, 48 P.3d 824.[1]

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[1] These last statements reflect the one real disagreement between the parties over the record. Philip Morris claims repeatedly that the record does not show that its fraud injured any party other than Williams. However, its opening brief indicates that Philip Morris does not contest how the Court of Appeals summarized the record. Rather, it argues that plaintiff did not

II. PROCEDURAL POSTURE

At trial, the jury found in favor of plaintiff on both the negligence and fraud claims, and it awarded compensatory damages of $821,485.50—$21,485.80 in economic damages and $800,000 in noneconomic damages.

As to the negligence claim, the jury found Williams 50% responsible for the damages. The jury declined to award any punitive damages respecting that claim. As to the fraud claim, however, the jury awarded punitive damages of $79.5 million.

The trial court significantly reduced the amounts awarded to the plaintiff. The court "capped" the

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put on any *specific* evidence to show that any *particular* person (other than Williams) continued smoking because of the fraud.

> "There is nothing in the record that supports the Court of Appeals' assumption that any Oregon smoker other than Williams smoked and sustained injuries *in reliance on the alleged fraud*. At most, plaintiff introduced evidence that smoking per se injured non-parties. However, the mere act of selling cigarettes is lawful conduct. Plaintiff never connected the injuries of non-parties to the fraud alleged in this case."

(Emphasis in original.)

In essence, Philip Morris is claiming that one cannot reasonably infer that anyone was actually fooled by its 40-year advertising campaign directed to thousands of Oregonians. Yet even the simplest assessment of human nature, viewed in light of the designedly addictive properties of cigarettes, tells any reasonable person that those lies would have been very persuasive. We think that such an appreciation of human nature fairly may be attributed to jurors, including the ones who heard this case. Moreover, Philip Morris's own conduct belies its protestations. As a for-profit corporation, it would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding.

noneconomic damages at $500,000 pursuant to *former* ORS 18.560 (1999), *renumbered as* ORS 31.710 (2003), thereby producing a total compensatory damage award of $521,485.80.[2] The court also reduced the punitive damage award. The court did conclude that $79.5 million "was within the range a rational juror could assess based on the record as a whole and applying the Oregon common law and statutory factors." Nevertheless, the court concluded, the $79.5 million punitive damage award "was excessive under federal standards." The trial court therefore reduced the punitive damage award to $32 million.

Both plaintiff and Philip Morris appealed to the Court of Appeals. In *Williams I*, the Court of Appeals reversed the trial court on plaintiff's appeal and reinstated the $79.5 million punitive damage award. 182 Or.App. at 72, 48 P.3d 824. It affirmed on Philip Morris's cross-appeal. *Id.* at 47, 48 P.3d 824. The court later adhered to its opinion on reconsideration. *Williams*, 183 Or.App. at 197, 51 P.3d 670. This court denied review. 335 Or. 142, 61 P.3d 938 (2002).

The United States Supreme Court then granted certiorari, vacated the Court of Appeals' judgment, and remanded the case to the Court of Appeals for that court to reconsider the amount of the punitive damages award in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). The Court of Appeals did so in

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[2] There is no issue in this case as it comes before us respecting the propriety of the trial court's application of *former* ORS 18.560.

Williams II, again reversing on plaintiff's appeal and affirming on Philip Morris's cross-appeal. We allowed review.

III. ISSUES ON REVIEW

On review, Philip Morris asks us to consider four issues, which it states as follows:

> "A. Is a defendant entitled to have the jury instructed that any award of punitive damages must bear a reasonable relationship to the harm caused to the plaintiff and that punitive damages cannot be imposed for alleged harm to non-parties?
>
> "B. Are the punitive damages assessed in this case unconstitutionally excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?
>
> "C. Must a plaintiff prove receipt of and reliance upon the defendant's allegedly fraudulent communications when he or she claims that a defendant committed fraud by communicating a false impression to the general public through mass media?
>
> "D. Does the Federal Cigarette Labeling and Advertising Act, 15 USC §§ 1331 *et seq.*, preempt the 'false impression' theory relied upon by the Court of Appeals, which is based in part upon a defendant's failure to disclose information beyond that prescribed by the congressionally mandated warnings?"

We will not consider the third and fourth issues. This court earlier declined review of all the issues decided in *Williams I*. The appeal remained alive

only because of, and to the extent that, the United States Supreme Court later directed the Court of Appeals to reconsider its decision respecting the amount of punitive damages in light of *Campbell*. The Court of Appeals performed that limited function in *Williams II*, and we allowed review of that decision. We decline to go beyond the Supreme Court's mandate, and the Court of Appeals' opinion in *Williams II*, to consider issues that this court previously determined were not review-worthy. *See* ORAP 9.20(2) (this court's opinion need not address every question presented on review).

The Supreme Court's decision in *Campbell* clearly relates to the second issue presented by Philip Morris. Philip Morris asserts that *Campbell* also relates to the first issue, regarding jury instructions. Because of that, and because the Court of Appeals addressed both issues in *Williams II*, we will consider those issues here.

IV. DISCUSSION

A. *Overview of State Farm v. Campbell*

We begin by reviewing the United States Supreme Court's opinion in *Campbell*.

The punitive damage award at issue in *Campbell* arose from an insured's action against an insurer for bad faith, fraud, and intentional infliction of emotional distress. 538 U.S. at 414, 123 S.Ct. 1513. Campbell, the insured, had caused an automobile accident that killed one person and permanently disabled another. *Id.* at 412-13, 123 S.Ct. 1513. When Campbell was sued, Campbell's insurer, State Farm, chose to contest liability. *Id.* at 413, 123 S.Ct. 1513. It refused settlement offers that were within policy

limits and took the case to trial despite the advice of one of its own investigators, in the process assuring Campbell and his wife that they would face no personal liability. *Id.* When the jury returned a verdict substantially above the policy limits, State Farm initially refused to cover the excess, telling the Campbells to put "for sale" signs on their property. *Id.* State Farm also refused to post a supersedeas bond to appeal the verdict. *Id.*

In their action against State Farm, the Campbells introduced evidence that State Farm's decision to try the case was part of a nationwide effort to limit payouts on insurance claims. *Id.* at 415, 123 S.Ct. 1513. The evidence "concerned State Farm's business practices for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells' complaint against the company." *Id.* The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. *Id.* The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million. *Id.* On appeal, the Utah Supreme Court reinstated the $145 million punitive damage award. *Id.* The United States Supreme Court granted certiorari. *Id.* at 416, 123 S.Ct. 1513.

The Court first noted that compensatory damages are intended to compensate for a loss, while punitive damages "are aimed at deterrence and retribution." *Id.* However, the Court noted, the Fourteenth Amendment's Due Process Clause prohibits imposing "grossly excessive or arbitrary punishments" on a tortfeasor. *Id.* A person must have fair notice, not just *that* the state will punish certain conduct, but

also how severely it will do so. *Id.* at 417, 123 S.Ct. 1513.

The Court identified two risks peculiar to punitive damages. First, although punitive damage awards are similar to criminal sanctions, defendants do not receive the procedural protections required of criminal trials. *Id.* Second, vague jury instructions can leave the jury with too much discretion in choosing the amount of punitive damages, allowing it to express preexisting biases or to rely too much on tangential or inflammatory evidence. *Id.* at 417-18, 123 S.Ct. 1513. For those reasons, the Court had directed "[e]xacting appellate review" of a jury's punitive damage award, considering three "guideposts" identified in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996):

> "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."

Campbell, 538 U.S. at 418, 123 S.Ct. 1513.

The Court then applied those guideposts. The first guidepost, the reprehensibility of defendant's conduct, represents "'[t]he most important indicium of the reasonableness of a punitive damages award.'" *Id.* at 419, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 575, 116 S.Ct. 1589). In analyzing reprehensibility, courts should consider whether

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Id. (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589).

In analyzing that guidepost in *Campbell*, however, the Court did not itself focus on those five considerations. Instead, it concentrated on how evidence of out-of-state conduct and dissimilar conduct had skewed the reprehensibility analysis against State Farm. The state wrongly relied on such conduct, the Court ruled, because a state cannot punish a defendant for its lawful conduct in another state, or for conduct that "occurred outside [the state] to other persons." *Id.* at 421, 123 S.Ct. 1513. In *Campbell*, most of the out-of-state conduct was lawful where it took place, and it was not connected to the harm to the Campbells. *Id.* at 422, 123 S.Ct. 1513. Furthermore, the Court held, a state cannot punish a defendant for "dissimilar acts": "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423, 123 S.Ct. 1513. In sum, the Court held that, because the Campbells showed "no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis." *Id.* at 424, 123 S.Ct. 1513.

The second *Gore* guidepost examines the ratio between the punitive damage award and the actual or potential harm to the plaintiff. *Campbell*, 538 U.S. at 424, 123 S.Ct. 1513. The ratio, however, is no mechanical formula. *Id.* ("we have been reluctant to identify concrete constitutional limits on the ratio"); *id.* at 425, 123 S.Ct. 1513 ("[w]e decline again to impose a bright-line ratio"); *id.* ("there are no rigid benchmarks that a punitive damage award may not surpass").

That said, the Court proceeded to give some guidance regarding the second guidepost. Twice in the past, the Court noted, it had suggested that a punitive damage award more than four times compensatory damages "might be close to the line of constitutional impropriety." *Id.* at 425, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 581, 116 S.Ct. 1589, and *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991)). The Court also had noted previously that, for 700 years, legislatures had authorized double, treble, or quadruple damages as a sanction. *Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 581 & n. 33, 116 S.Ct. 1589). The Court concluded that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425, 123 S.Ct. 1513.

> "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in [the] range of 500 to 1, or, in this case, of 145 to 1."

Id. (citation omitted).

The Court did acknowledge, however, that even those tentative ratios might be adjusted up or down. A greater ratio might comport with due process if " 'a particularly egregious act has resulted in only a small amount of economic damages,' " if " 'the injury is hard to detect,' " or if " 'the monetary value of noneconomic harm might have been difficult to determine.' " *Id.* at 425, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 582, 116 S.Ct. 1589). With a "substantial" compensatory damage award, however, due process might require "a lesser ratio, perhaps only equal to compensatory damages." *Id.* But "[t]he precise award * * * must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

In applying the second *Gore* guidepost, the Court stated that there is "a presumption against an award that has a 145-to-1 ratio." *Id.* at 426, 123 S.Ct. 1513. The Campbells had received a substantial compensatory damage award; they were injured economically, not physically; and State Farm paid the excess verdict before the Campbells sued them, so their economic injuries were minor. *Id.* Additionally, the outrage and humiliation that State Farm caused the Campbells may have been considered twice—once in the compensatory damage award and again in the punitive damage award. *Id.*

The Court also rejected several other factors that the Utah Supreme Court had identified in support of the punitive damage award. For example, the Utah Supreme Court had pointed to State Farm's wealth. The Court concluded that wealth should not have been considered:

> "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*. * * * The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award. *Gore*, 517 U.S., at 585, 116 S.Ct. 1589 ('The fact that BMW is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business'); see also *id.*, at 591, 116 S.Ct. 1589 (Breyer, J., concurring) ('[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy * * *. That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as "reprehensibility," to constrain significantly an award that purports to punish a defendant's conduct')."

Id. at 427-28, 123 S.Ct. 1513.

The third guidepost compares the punitive damage award to comparable civil and criminal penalties. *Id.* at 428, 123 S.Ct. 1513. Criminal penalties, however, do not help as much in determining "the dollar amount of the award":

> "Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the

> remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

Id.

The comparable civil sanctions in *Campbell* fell well below the punitive damage award. The Court identified only one, a $10,000 fine for fraud. *Id.* The Utah Supreme Court had pointed to other, more substantive penalties, but they were all based on evidence of out-of-state and dissimilar conduct. *Id.*

In all, the Court in *Campbell* found the case "neither close nor difficult," *id.* at 418, 123 S.Ct. 1513, and concluded that $145 million in punitive damages violated due process, *see id.* at 429, 123 S.Ct. 1513 (concluding award was "irrational and arbitrary deprivation" of property). The Court suggested that the guideposts,

> "especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."

Id. However, the Court concluded, Utah state courts should calculate punitive damages in the first instance. *Id.* at 429, 123 S.Ct. 1513.

With the foregoing principles in mind, we turn to the questions presented on review.

B. *The Trial Court's Refusal to Give Philip Morris's Proposed Jury Instruction No. 34*

Philip Morris first argues that the trial court erred in refusing to give its proposed jury instruction number 34. That instruction stated, in part:

> "The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

In *Williams I*, the Court of Appeals concluded that that instruction was incorrect under state law. 182 Or.App. at 63-64, 48 P.3d 824. We agree. *See Parrott*, 331 Or. at 563, 17 P.3d 473 (evaluating punitive damage award; "Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers."). That is, the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.

Philip Morris, however, contends that *Campbell* overrules state rules like the one set out in *Parrott*. Specifically, Philip Morris asserts that *Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for

harm to nonparties.[3] In support of that argument, Philip Morris quotes the following from Campbell:

> "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *. * * * Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore*, *supra*, [517 U.S.] at 593 (Breyer, J., concurring) ('Larger damages might also "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover')."

538 U.S. at 423, 123 S.Ct. 1513.

We think that Philip Morris takes the foregoing quoted material from *Campbell* out of context. The quote referred only to *dissimilar* acts and dissimilar claims; the Court intended to prohibit a punitive damage award from becoming a referendum on a corporate defendant's general behavior as a citizen. The full paragraph in *Campbell* states:

> "For a more fundamental reason, however, the Utah courts erred in relying upon this

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[3] Philip Morris does not explain how its instruction summarizes its interpretation of *Campbell*. It is unclear to us how a jury could "consider" harm to others, yet withhold that consideration from the punishment calculus. If a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all.

> and other evidence: The courts awarded punitive damages to punish and deter *conduct that bore no relation to the Campbells' harm.* A defendant's *dissimilar acts, independent from the acts upon which liability was premised,* may not serve as the basis for punitive damages. *A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.* Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here. [*Campbell v. State Farm Mut. Auto. Ins. Co.*,] 65 P.3d [1134], at 1149 [(Utah 2001)] ('Even if the harm to the Campbells can be appropriately characterized as minimal, the trial court's assessment of the situation is on target: "The harm is minor to the individual but massive in the aggregate" '). Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore, supra,* [517 U.S.] at 593, 116 S.Ct. 1589 (Breyer, J., concurring) ('Larger damages might also "double count" by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover')."

538 U.S. at 422-23, 123 S.Ct. 1513 (emphasis added).

Considering the foregoing material as a whole, we conclude that evidence of *similar* conduct against

other parties may be relevant to a punitive damage award. The Court criticized the Utah courts only for allowing in evidence of *dissimilar* conduct:

> "The Campbells have identified scant evidence of repeated misconduct *of the sort that injured them.* * * * Although *evidence of other acts need not be identical to have relevance in the calculation of punitive damages*, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. * * * The reprehensibility guidepost *does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance*, which in this case extended for a 20-year period. In this case, because the Campbells have shown no conduct by State Farm *similar to that which harmed them*, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis."

Id. at 423-24, 123 S.Ct. 1513 (emphasis added). *See also id.* at 427, 123 S.Ct. 1513 ("The failure of the company to report the Texas award is out-of-state conduct that, *if the conduct were similar*, might have had some bearing on the degree of reprehensibility, subject to the limitations we have described." (emphasis added)).

Philip Morris's proposed jury instruction would have prohibited the jury from "punish[ing] the defendant for the impact of its alleged misconduct on other persons," even if those other persons were Oregonians who were harmed by the same conduct that had harmed Williams, and in the same way. As we

noted, that is not correct as an independent matter of Oregon law respecting the conduct of jury trials and instructions that are given to juries. Neither, as we read in *Campbell*, does it correctly state federal due process law. Because the proposed jury instruction did not accurately reflect the law, the trial court did not commit reversible error when it refused to give it. *See Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 106, 957 P.2d 147 (1998) (trial court's refusal to give requested jury instruction "is no[t] error if the requested instruction is not correct in all respects").

Philip Morris also claims that the trial court committed reversible error because the jury instructions that *were* given did not accurately reflect some aspects of *Campbell's* holding. But Philip Morris did not preserve that argument before the Court of Appeals. *See* ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claimed error * * * is assigned as error in the opening brief * * *."); *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 380, 823 P.2d 956 (1991) (to preserve error, "the adversely affected party must have * * * raised the issue on appeal by an assignment of error in its opening brief"). Fairly read, Philip Morris's assignment of error in the Court of Appeals claimed only that the trial court erred in refusing to give requested instruction number 34. That narrow assignment of error did not give the Court of Appeals notice that it needed to consider any challenge to the instructions actually given.

Based on the foregoing discussion, we affirm the Court of Appeals on the first issue.

C. *The Punitive Damage Award and Federal Due Process*

On review of a punitive damage award under the Due Process Clause of the Fourteenth Amendment, a court must determine whether the punitive damage award is "'grossly excessive'." *Parrott*, 331 Or. at 554, 17 P.3d 473 (emphasis deleted; citing *Gore*, 517 U.S. at 568, 116 S.Ct. 1589). Whether the verdict exceeds the gross excessiveness standard is a question of law. *Id.* at 555, 17 P.3d 473.

In *Parrott*, this court identified five factors to be considered to determine whether a punitive damage award is grossly excessive:

> "[T]he range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct."

Id. (citations omitted). *Parrott* has been superseded somewhat by *Campbell*, but the last three *Parrott* factors are, of course, the *Gore* guideposts as they have been further elucidated by *Campbell*. We consider only those guideposts in the following analysis.

The first guidepost directs us to consider, based on the facts contained in the record, how reprehensi-

ble Philip Morris's conduct was. As noted, we consider whether:

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

Campbell, 538 U.S. at 419, 123 S.Ct. 1513 (citing *Gore*, 517 U.S. at 576-77, 116 S.Ct. 1589). And, as we have explained, the jury, in assessing the reprehensibility of Philip Morris's actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct.

Again, we construe all facts in favor of plaintiff, the party in whose favor the jury ruled. Doing so, there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible. Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.

Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris's deceit thus would, naturally and inevitably, lead to significant injury or death.

Although it weighs less in our analysis, we also note that Philip Morris harmed a much broader class of Oregonians. Every smoker tricked by its scheme, even those who never got ill, kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies. And every one of those smokers *risked* serious illness or death for as long as they remained deceived.

Of the five reprehensibility factors listed in *Gore* and recited—if not precisely used—in *Campbell*, four certainly are met here. The harm to Williams was physical—lung cancer cost Williams his life. Philip Morris showed indifference to and reckless disregard for the safety not just of Williams, but of countless other Oregonians, when it knowingly spread false or misleading information to keep smokers smoking. Philip Morris's actions were no isolated incident, but a carefully calculated program spanning decades. And Philip Morris's wrongdoing certainly involved trickery and deceit.[4] We conclude, then, that the first *Gore* guidepost favors a very significant punitive damage award.

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[4] Only one factor arguably is not met: There is no evidence that Williams was especially financially vulnerable. Plaintiff argues that Williams was vulnerable in another way, because he was addicted to cigarettes and so more susceptible to Philip Morris's deceptive message. *Gore* indirectly suggests that reprehensibility may include other sorts of vulnerability than financial. *See* 517 U.S. at 576, 116 S.Ct. 1589 (suggesting that higher punitive damages are appropriate, even though the injury is *solely economic*, if "the target is financially vulnerable"). However, as we will discuss, we would affirm this punitive damage award even if that factor was not met.

We also conclude that the third *Gore* guidepost—comparable civil or criminal sanctions—favors plaintiff. In examining that guidepost, however, we believe that it is important to correct two errors that the Court of Appeals committed in applying it.

In *Williams I*, the Court of Appeals suggested that, because the comparable sanctions guidepost was about notice to a prospective defendant, "the established Oregon law of punitive damages, including ORS 30.925(2)," gave Philip Morris adequate notice here. 182 Or.App. at 72, 48 P.3d 824. That was not correct.

Courts consider comparable sanctions for two reasons. First, comparable sanctions suggest a legislative determination about what constitutes an appropriate sanction for the conduct, a determination that is entitled to "substantial deference." *Gore*, 517 U.S. at 583, 116 S.Ct. 1589 (internal quotation marks and citation omitted). Second, comparable sanctions may give a defendant fair notice of the penalties that the conduct may carry. *Id.* at 584, 116 S.Ct. 1589 ("None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.").

Those reasons explain why we conclude that the Court of Appeals misunderstood the guidepost. Neither Oregon law generally, nor ORS 30.925(2) specifically,[5] suggest how severely the state may choose

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[5] ORS 30.925 provides, in part:

"(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

to punish Philip Morris's conduct. Thus, they do not independently provide a legislative standard entitled to substantial deference. If the Court of Appeals' analysis were correct, then the third *Gore* guidepost would always support *any* punitive damage award, *i.e.*, the mere existence of the award would justify itself automatically, regardless of the amount awarded. That reasoning is circular, and we reject it.

In *Williams I*, the Court of Appeals also suggested that the comparable sanctions guidepost does not "play[ ] a major role one way or the other," because it concluded that there were no comparable civil penalties and that criminal penalties were not truly comparable. 182 Or.App. at 72, 48 P.3d 824. Although it is not clear to us that the foregoing

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"(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

"(b) The degree of the defendant's awareness of that likelihood;

"(c) The profitability of the defendant's misconduct;

"(d) The duration of the misconduct and any concealment of it;

"(e) The attitude and conduct of the defendant upon discovery of the misconduct;

"(f) The financial condition of the defendant; and

"(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

Of course, those criteria were established without the benefit of the *Campbell* decision, and may be applied only to the extent that they comport with that decision.

statement correctly interprets and applies the law as *Campbell* now explicates that law, we need not pursue that issue definitively here. That is true, because applying the comparable sanctions guidepost involves more than just asking whether the dollar amount of the sanction equals or exceeds the punitive damage award. *Campbell* proves that. There, the most relevant civil sanction was $10,000; the Court found that civil sanction was "dwarfed" by the $145 million punitive damage award. 538 U.S. at 428, 123 S.Ct. 1513. Yet the Court approved a punitive damage award "at or near the amount of compensatory damages," *id.* at 429, 123 S.Ct. 1513, *i.e.*, an award somewhere around $1 million. And a $1 million punitive damage award was still 100 times the comparable sanction.

So far as we can discern from *Campbell*, then, the "comparable sanctions" guidepost requires three steps. First, courts must identify comparable civil or criminal sanctions. Second, courts must consider how serious the comparable sanctions are, relative to the universe of sanctions that the legislature authorizes to punish inappropriate conduct. Third, courts must then evaluate the punitive damage award in light of the relative severity of the comparable sanctions. The guidepost may militate against a significant punitive damage award if the state's comparable sanctions are mild, trivial, or nonexistent. However, the guidepost will support a more significant punitive damage award when the state's comparable sanctions are severe.

We turn, then, to consider the facts of this case, in light of the guideposts and the Fourteenth Amendment. If there are comparable civil sanctions,

the parties did not cite them to us and we have not found them by independent investigation.

There are what we consider to be comparable criminal sanctions, but we must exercise care when relying on them. As the Court took pains to caution in *Campbell*:

> "The existence of a criminal penalty does have [a] bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

538 U.S. at 428, 123 S.Ct. 1513. That admonition is important, of course. But the basis for holding that Philip Morris's actions in this case compare to a familiar crime is not speculative or remote. Viewing the facts in the light most favorable to plaintiff, Philip Morris's actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter. *See* ORS 163.040 (1953).[6] Today, its actions would constitute

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[6] In 1953, that statute provided, in part:

at least second-degree manslaughter, a Class B felony. *See* ORS 163.125(1)(a).[7] Individuals who commit Class B felonies may face up to 10 years in

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"(2) Any person who, in the commission of * * * a lawful act without due caution or circumspection, involuntarily kills another, is guilty of manslaughter. * * *

"(3) Every killing of a human being by the act, procurement or culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable or negligent homicide as provided in ORS 163.090 [negligent homicide by operation of motor vehicle], is manslaughter."

[7] The Oregon statutes generally define criminal homicide as follows:

"A person commits criminal homicide if, without justification or excuse, the person intentionally, knowingly, recklessly or with criminal negligence causes the death of another human being."

ORS 163.005(1).

Second-degree manslaughter is a specific category of criminal homicide:

"(1) Criminal homicide constitutes manslaughter in the second degree when:

"(a) It is committed recklessly[.]

"* * * * *

"(2) Manslaughter in the second degree is a Class B felony."

ORS 163.125.

Reckless conduct is defined in ORS 161.085(9):

" 'Recklessly,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

prison and a fine of up to $250,000. ORS 161.605(2) (term of imprisonment); ORS 161.625(1)(c) (fine). Corporations that commit a felony of any class may be fined up to $50,000, or required to pay up to twice the amount that the corporation gained by committing the offense. ORS 161.655(1)(a) and (3). Thus, the possibility of severe criminal sanctions, both for any individual who participated and for the corporation generally, put Philip Morris on notice that Oregon would take such conduct very seriously.[8] We conclude that the third guidepost, like the first, supports a very significant punitive damage award.

The same cannot be said of the second *Gore* guidepost. As noted, that guidepost considers the ratio between the punitive damage award and the compensatory damage award. The numerator of the ratio is fixed by the punitive damage award: $79.5 million.

To determine the denominator of the ratio, we consider not only the harm actually suffered by plaintiff, but also the potential harm to plaintiff. *See Campbell*, 538 U.S. at 418, 123 S.Ct. 1513 ("actual or potential harm suffered by the plaintiff"); *id.* at 424, 123 S.Ct. 1513 (ratio "between harm, or potential harm, to the plaintiff and the punitive damages award"). Plaintiff suffered relatively small economic

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[8] The fines and periods of imprisonment have changed over the many years that Philip Morris carried out its scheme. In 1953, for example, manslaughter carried a much longer prison term (15 years), but a much lower fine ($5,000). ORS 163.080 (1953). The point, however, is that reckless conduct like Philip Morris's, when it resulted in death (as it did here), always has constituted a criminal act to which attached a severe potential criminal penalty.

damages for Williams's wrongful death—less than $25,000. However, that low figure occurred only because Williams died shortly after being diagnosed with cancer. If Williams had lived long enough to incur substantial medical bills, for example, economic damages could easily have been 10 or more times the amount awarded here. Only chance saved Philip Morris from a much higher compensatory damage award.[9]

In analyzing the ratio of punitive to compensatory damages, the Court of Appeals also added to the compensatory damages calculus the estimated harm to others. *Williams II*, 193 Or.App. at 562, 92 P.3d 126 (estimating that 100 Oregonians had been harmed by Philip Morris's scheme, and so concluding ratio was less than 4:1).

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[9] One sentence in *Campbell* suggested that a small award of " '*economic damages*' " might, when combined with particularly egregious conduct, justify a higher ratio. 538 U.S. at 425, 123 S.Ct. 1513 (quoting *Gore*, 517 U.S. at 582, 116 S.Ct. 1589; emphasis added).

We conclude, however, that the Court meant compensatory damages generally, not economic damages specifically. *See id.* ("The converse is also true, however. When *compensatory* damages are substantial, then a lesser ratio * * * can reach the outermost limit of the due process guarantee." (emphasis added)); *see also id.* at 426, 123 S.Ct. 1513 (expressing concern that compensatory damages might have included outrage or humiliation component duplicated in punitive damage award). That accords with *Gore*, 517 U.S. at 582, 116 S.Ct. 1589 ("[L]ow awards of *compensatory* damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages." (emphasis added)).

Using harm to others as part of the ratio may have been correct under the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (Stevens, J., joined by Rehnquist, C. J., and Blackmun, J.) (relationship between actual and punitive damages should consider "the possible harm to other victims that might have resulted if similar future behavior were not deterred"). However, it no longer appears to be permissible (if it ever was) to factor in that consideration. Although *Campbell* held that similar acts could bear on reprehensibility (discussed above), it now appears that harm to others should not be considered as part of the ratio guidepost. *See* 538 U.S. at 426-27, 123 S.Ct. 1513 ("Since the Supreme Court of Utah discussed the Texas award when applying the ratio guidepost, we discuss it here. The Texas award, however, should have been analyzed in the context of the *reprehensibility guidepost only*." (emphasis added)); *see also id.* at 427, 123 S.Ct. 1513 (had Texas award involved similar conduct, it "might have had some bearing on the degree of reprehensibility"); *Gore*, 517 U.S. at 582-83, 116 S.Ct. 1589 (Court used 500:1 as ratio, although Court noted in 35 that ratio would have been 35:1 if damages to other Alabama consumers had been included). From the foregoing, we conclude that the ratio guidepost considers only harm to the plaintiff. *See Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (precise award must be based on "the defendant's conduct and the harm *to the plaintiff*" (emphasis added)); *id.* at 426, 123 S.Ct. 1513 (punishment must be "reasonable and proportionate to the amount of *harm to the plaintiff* and to the general damages recovered" (emphasis added)).

There also is some imprecision regarding what amount we should use for noneconomic damages—is it the $800,000 awarded by the jury, or the $500,000 awarded by the trial court after applying the statutory cap? We need not decide between the "capped" or "uncapped" figure, however, because it makes no difference here. Either way, the second *Gore* guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case. *See Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 (so stating).

In *Williams II*, the Court of Appeals also relied on Philip Morris's wealth to conclude that the jury's punitive damage award did not violate due process. 193 Or.App. at 563, 92 P.3d 126. Philip Morris objects that *Campbell* prohibits using wealth in that way. We agree. Wealth "cannot justify an otherwise unconstitutional punitive damages award." *Campbell*, 538 U.S. at 427, 123 S.Ct. 1513. If a punitive damage award is grossly excessive under *Gore* and *Campbell*, then the defendant's wealth will not make it constitutional. In short, wealth is not a fourth *Gore* guidepost.

However, *Campbell* did not otherwise remove wealth from the punitive damage equation, as Philip Morris asserts. A jury still may levy a higher punitive damage award against a wealthy defendant, as long as the final punitive damage award does not exceed the constitutional limits established by the three *Gore* guideposts. *Id.* at 427, 123 S.Ct. 1513 (wealth "cannot justify an *otherwise unconstitutional* punitive damages award," indicating that punitive damage award could be constitutional even though jury considered wealth (emphasis added)); *see id.* at

428, 123 S.Ct. 1513 (wealth is not " 'unlawful or inappropriate' " factor (quoting *Gore*, 517 U.S. at 591, 116 S.Ct. 1589 (Breyer, J., concurring))). Consistently with the foregoing, Oregon law specifically permits a jury to consider a defendant's financial condition when it imposes a punitive damage award. ORS 30.925(2)(f).

Of the three *Gore* guideposts, then, two support a very significant punitive damage award. One guidepost—the ratio—cuts the other way. In the end, we are left to use those competitive tools to assess whether the jury's punitive damage award was not "grossly excessive" and therefore should be reinstated.

The *Gore* guideposts are not bright-line tests. *See, e.g., Campbell*, 538 U.S. at 425, 123 S.Ct. 1513 ("there are no rigid benchmarks that a punitive damages award may not surpass"); *see also Gore*, 517 U.S. at 582, 116 S.Ct. 1589 ("we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"). In other words, the guideposts are only that—guideposts. *Gore* also referred to them as indicia. 517 U.S. at 575, 116 S.Ct. 1589 (reprehensibility is "most important indicium"); *id.* at 580, 116 S.Ct. 1589 (ratio is "second and perhaps most commonly cited indicium"); *id.* at 583, 116 S.Ct. 1589 (comparable sanctions "provides a third indicium for excessiveness"). *Campbell* specifically contemplated that *some* awards exceeding single-digit ratios would satisfy due process. *See id.* at 425, 123 S.Ct. 1513 ("in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"). Single-digit ratios may mark the boundary in ordinary

cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.

In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards. It follows that the Court of Appeals correctly held that the trial court should have entered judgment against Philip Morris for the full amount of the jury's punitive damage award.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.

APPENDIX C

[Opinion of the Oregon Court of Appeals (June 9, 2004)]

193 Ore. App. 527, 92 P.3d 126

Court of Appeals of Oregon.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS,
Deceased, Appellant-Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED,
Respondent-Cross-Appellant,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

9705-03957; A106791.

Submitted on Remand Nov. 17, 2003.

Decided June 9, 2004.

Before EDMONDS, Presiding Judge, and ARMSTRONG and WOLLHEIM, Judges.

EDMONDS, P.J.

This case comes to us on remand from the United States Supreme Court. *Philip Morris USA Inc. v. Williams*, 540 U.S. 801, 124 S.Ct. 56, 157 L.Ed.2d 12 (2003). We previously reversed the trial court's reduction of the jury's award of punitive damages on plaintiff's fraud claim and remanded the case with instructions to enter judgment on the verdict. We af-

firmed on defendant's cross-appeal. *Williams v. Philip Morris Inc.*, 182 Or.App. 44, 48 P.3d 824, *adh'd to on recons.*, 183 Or.App. 192, 51 P.3d 670, *rev. den.*, 335 Or. 142, 61 P.3d 938 (2002). The Court thereafter granted defendant's petition for a writ of *certiorari*, vacated our decision, and remanded the case for reconsideration in light of its recent decision in *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003) (*State Farm*). On remand, we reach the same result that we reached in our previous decision.

We readopt our previous opinion in all respects that are not superseded by our discussion in this opinion, including our statement of the facts and our resolution of issues of Oregon and federal law. Our failure to discuss any issue that defendant raises on remand indicates that we are satisfied with our previous resolution of that issue. We begin by summarizing the facts that we described in our previous opinion, again construing the evidence most favorably to plaintiff because of the verdict in her favor. These then are the facts that the jury could have found on the evidence before it.

Plaintiff is the widow of Jesse D. Williams (Williams) and the personal representative of his estate. Defendant is a leading manufacturer of cigarettes and currently has about half of the domestic market for that product. From the early 1950s until his death from a smoking-related lung cancer in 1997, Williams smoked defendant's cigarettes, primarily its Marlboro brand, eventually developing a habit of three packs a day. At that point, he spent half his waking hours smoking and was highly addicted to tobacco, both physiologically and psychologically. Although, at the urging of his wife and children, he

made several attempts to stop smoking, each time he failed, in part because of his addiction. Despite the increasing amount of information that linked smoking to health problems during this period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding published assertions that cigarette smoking was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt betrayed, stating "those darn cigarette people finally did it. They were lying all the time." He died about six months after his diagnosis.

In resisting the information about the dangers of smoking, Williams was responding to a campaign that defendant, together with the rest of the tobacco industry, created and implemented for the purpose of undercutting the effect of that information. During most of that campaign, the industry did not expressly assert that cigarettes were safe because it knew that it could never prove their safety. Instead, defendant and the industry attempted to make it appear that the evidence against cigarettes was sufficiently uncertain so that smokers would find a reason to justify their continued smoking. To achieve that result, defendant and the rest of the industry worked together for more than 40 years to create a public impression that there was a legitimate controversy about whether cigarettes were dangerous to a smoker's health and that resolving that health issue would require further research. Although defendant and the other companies knew throughout most, if

not all, of that 40-year period that cigarette smoking was in fact dangerous, they intended that smokers rely on the false impression that the industry created.

The industry established its strategy and began developing its public image in response to a decline in cigarette sales in 1953 that was the apparent result of studies that showed that cigarette tar could cause cancer in mice and that established the existence of statistical correlations between smoking and lung cancer. The first public joint effort by the industry occurred in January 1954, when defendant and other tobacco companies published a joint statement in 448 newspapers throughout the country. In that statement, among other things, they announced the creation of the Tobacco Industry Research Committee (TIRC), one of whose stated goals was to conduct research into "all phases of tobacco use and health." In 1964, the year of the Surgeon General's report on the hazard of smoking to health, the industry divided the TIRC into two parts, one of which, the Council on Tobacco Research (CTR), continued to support scientific research. The other part, named the Tobacco Institute, focused on public relations and lobbying.

Between 1954 and the 1990s, those organizations developed and promoted an extensive campaign to counter the effects of negative scientific information on cigarette sales. The individual tobacco companies, including defendant, were part of the organizations and acted in cooperation with them. At first, the industry publicly denied that there was a problem; for example, in the 1950s and early 1960s, defendant's officials told the public that defendant would "stop business tomorrow" if it believed that its

products were harmful. For most of that period, however, the industry did not attempt to refute the scientific information directly; rather, it tried to find ways to create doubts about it. The industry's goal was to create the impression that scientists disagreed about whether cigarette smoking was dangerous, that the industry was vigorously conducting research into the issue, and that a definitive answer would not be possible until that research was complete. As one of defendant's vice-presidents explained in an internal memo, the purpose was to give smokers a psychological crutch and a self-rationale that would encourage them to continue smoking. A Tobacco Institute internal memorandum similarly described the industry's purpose to provide smokers "ready-made credible alternatives" to the evidence of the dangers of smoking.

Both the industry as a whole and defendant acted consistently with those purposes. Among other things, they avoided developing contradictory information. Despite the industry's nominal emphasis on the need for further research, the CTR designed its research program to avoid studying the biological effects of tobacco use, the very question that, according to the industry's statements, required more research. To the extent that defendant conducted research on that issue independently of the CTR, it did so in a European laboratory that it purchased, and it was careful to avoid preserving records of the results in this country. Defendant's director of research in the late 1970s and 1980s explained to a subordinate that his job was to attack outside research that was inconsistent with the industry's position by casting doubt on it. The jury could also have found that there was a "gentleman's agreement" not to conduct

research beyond what the CTR did. The primary purpose of the CTR's research was to provide expert witnesses for congressional hearings and lawsuits, not to determine the relationship between smoking and disease. The CTR's lawyers, rather than its scientists, established its research priorities; developing accurate information on the biological effects of smoking was not one of the lawyers' priorities.

The jury could have found that, throughout this period of time, defendant and the other tobacco companies actually had little doubt that cigarette smoking was causally related to a number of diseases. In 1958, three British researchers found that the American tobacco scientists with whom they spoke believed that cigarette smoke could cause cancer. In 1961, defendant's director of research stated that cigarette smoke contained so many carcinogens that the best that the company could do was to reduce their amounts. Internal company memoranda agreed and suggested that it could not admit those facts publicly because of adverse legal consequences. At least by the 1970s, there was absolutely no scientific basis for denying the connection between cigarette smoking and cancer and other diseases. However, defendant continued to assert that the hazard of cigarette smoking to health was uncertain when it actually knew that there was no legitimate controversy about that subject.

The jury could also have found that defendant recognized both that nicotine was addictive and that its addictive effect was the primary reason that people continued to smoke. Defendant spent considerable effort discovering ways to deliver the optimal dose of nicotine in each cigarette without actually adding nicotine to its product. It also concluded that,

because of nicotine's addictive effect, smoking cessation programs and technologies would be unlikely to work without significant behavioral therapy. In its view, providing smokers a reason to believe that there were serious doubts that tobacco was harmful would discourage smokers from making the effort that was necessary to quit smoking.

Also, the jury could have found that defendant and the industry used a large number of methods to create the public impression of a legitimate controversy, despite the lack of supporting scientific evidence. They issued press releases, influenced the content of apparently neutral articles, cultivated opinion leaders, attempted to use their advertising power to get favorable treatment from the print media, and appeared on commercial and public television to put forth that message. Those individuals who spoke for defendant and the industry emphasized that the evidence concerning the dangers of smoking was primarily based on statistical relationships, and they argued that there was no proof that a specific component of tobacco smoke caused a specific disease. Even after the early 1990s, when the industry finally had to admit that tobacco could be a risk factor associated with a number of diseases, it argued that there was a long chain of intervening events before a disease actually arose from cigarette smoking. The industry, including defendant, also continued to deny that cigarette smoking was addictive and publicized that message throughout the country, including Oregon.

As a smoker, Williams was one of the intended recipients of the industry's message, and, in fact, the jury could have found that he received its message and relied on its representations. Those representa-

tions affected his decision to continue smoking and not to make greater efforts to overcome his addiction. When his family urged him to stop smoking, he responded that he had learned from watching television that smoking did not cause lung cancer. After his diagnosis, he blamed the "cigarette people" for betraying him—which, given his exclusive use of defendant's products, must at least have included defendant. The jury could have found on the evidence before it that, as a result of defendant's representations, Williams suffered his fatal lung cancer. The jury also could have found that Williams was one of thousands of Oregonians who received defendant's message, acted on it, and, like him, suffered cancer or other diseases as a result.

In our previous opinion, we described the requirements for proving a fraud claim in Oregon and explained why the jury could have found that plaintiff had proven fraud in this case. In short, the jury could have found that defendant, by itself and through the industry effort of which it was a part, intentionally made the false representation that there was a legitimate controversy about the health effects of cigarette smoking, that defendant knew that that representation was false, that Williams relied on it, that he thereafter continued to smoke, and that he suffered his fatal lung cancer as a result of that reliance. *Williams*, 182 Or.App. at 49-70, 48 P.3d 824. Based on the evidence, the jury awarded plaintiff compensatory damages of $21,485.80 in economic damages and $800,000 in noneconomic damages on that claim. In accordance with *former* ORS 18.560(1) (1999), *renumbered as* ORS 31.710(1) (2003), the trial court reduced the amount of noneconomic damages to $500,000 when it entered judgment.

In addition to compensatory damages, the jury awarded plaintiff punitive damages of $79.5 million, which the trial court reduced to $32 million. In our previous opinion, we reinstated the jury's verdict on those damages. The issue before us on remand is the extent to which that award of punitive damages is consistent with the Due Process Clause of the Fourteenth Amendment, particularly as the Court interpreted it in *State Farm*. In our previous opinion, we followed the Oregon Supreme Court's decision in *Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 17 P.3d 473 (2001), in deciding the federal constitutional issue. Now, on remand from the United States Supreme Court, we determine whether our earlier decision is consistent with the Supreme Court's discussion in *State Farm*. We begin that analysis by reviewing earlier United States Supreme Court cases on punitive damages, cases that provide the context for understanding the Court's decision in *State Farm*.

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), is the first case in which the Court considered the effect of the Due Process Clause on the size of an award of punitive damages.[1] In *Haslip*, the defendant Ruffin, an agent and employee of the defendant insurance company, sold life insurance issued by the defendant company, together with health insurance issued by an unrelated company, to an Alabama municipality

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[1] The Court had previously rejected challenges to punitive damages under the Excessive Fines Clause of the Eighth Amendment. In several other cases, it had noted the possibility of a due process challenge but concluded that the issue was not properly raised. *See Haslip*, 499 U.S. at 9-12, 111 S.Ct. 1032.

of which the plaintiffs were employees. Ruffin had the municipality send the premiums for the insurance to him at the company's branch office, rather than to the insurers directly, but he did not forward the premiums to either insurer. As a result of its failure to receive premiums, the health insurer sent notices that the insurance had lapsed for nonpayment to the plaintiffs, in care of Ruffin at the defendant company's branch office. Ruffin did not forward those notices to the plaintiffs. When the plaintiff Haslip sought medical services, she learned that she was uninsured and that she was personally liable for the charges that she had incurred. She was unable to pay her medical bills, and her physician placed her account with a collection agency. The agency obtained a judgment against her, adversely affecting her credit. *Haslip*, 499 U.S. at 4-5, 111 S.Ct. 1032.

The plaintiffs sued Ruffin and the defendant company for fraud. The jury returned general verdicts for damages for all plaintiffs. The verdict for Haslip was $1,040,000, which, the Court assumed, consisted of $200,000 in compensatory damages (the maximum amount that Haslip's attorney requested in his closing argument) and $840,000 in punitive damages. The Alabama Supreme Court affirmed the award, and the United States Supreme Court granted *certiorari*. *Haslip*, 499 U.S. at 5-8, 111 S.Ct. 1032. In its opinion, the Court first held that the Alabama common-law rule that made the company vicariously liable for punitive damages for its employee's fraud did not violate due process. *Id.* at 12-15, 111 S.Ct. 1032. It then turned to the constitutionality of the award of punitive damages.

The Court began by concluding that the common-law method of assessing punitive damages—initially

by a jury that is instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct, followed by trial and appellate court review—is consistent with due process. *Haslip*, 499 U.S. at 15-18, 111 S.Ct. 1032. It then evaluated whether the award to Haslip was constitutionally acceptable. It observed that, although it is not possible to draw a mathematical bright line between the constitutionally acceptable and the unacceptable, the reasonableness of the award and whether the jury received adequate guidance from the court are significant considerations. The trial court had expressly instructed the jury on the purposes of punitive damages—not to compensate but to punish and to deter future conduct. That instruction operated to limit the jury's discretion. In addition, under Alabama law, the jury did not receive evidence of the defendant's wealth, and the court told the jury that whether to award punitive damages at all was within its discretion. Thus, the jury's discretion in determining punitive damages was no greater than it would have been in many other areas of law. *Id.* at 18-20, 111 S.Ct. 1032.

Alabama had also provided significant judicial review of the jury's award. Before *Haslip*, the Alabama Supreme Court had established procedures for a trial court to evaluate a jury award of punitive damages, including requiring the court to place the reasons for its decision in the record. In addition, Alabama provided appellate review of the criteria that it had previously established to ensure that punitive damage awards were reasonable in amount and rational in light of their purpose. *Haslip*, 499 U.S. at 20-21, 111 S.Ct. 1032. The Court concluded that those criteria imposed a sufficiently definite and

meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages. It especially noted that factfinders who are asked to award punitive damages must be guided by more than the defendant's net worth. The Court said, "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Id.* at 22, 111 S.Ct. 1032.

After concluding that the defendant had received the full panoply of protections that Alabama provided, the Court mentioned that the award was more than four times the compensatory damages, more than 200 times Haslip's out-of-pocket expenses, and considerably in excess of a fine for insurance fraud. However, it concluded that, although "the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria." *Haslip*, 499 U.S. at 23, 111 S.Ct. 1032. The Court therefore affirmed the judgment for the plaintiff. *Id.* at 23-24, 111 S.Ct. 1032.

The next case that the Court considered, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (TXO), arose out of a property dispute between two energy companies. TXO, the defendant, agreed to purchase rights to develop gas and oil on property where the plaintiff Alliance Resources controlled the major share of the rights. The agreement was subject to TXO's attorney determining that Alliance's title to the property was valid. In the process of making that determination, TXO discovered a 1958 deed that conveyed the coal mining rights on the property to another party. Although both the wording of the deed and interviews with the parties involved made it clear that the grantor had not conveyed oil and gas

rights, TXO paid for a quitclaim deed from the owner of the coal rights and attempted to renegotiate its agreement with Alliance. It also unsuccessfully attempted to induce the grantor of the 1958 deed to execute a false affidavit to the effect that the deed included oil and gas rights. *Id.* at 447-49, 113 S.Ct. 2711.

When its other efforts failed, TXO filed an action to quiet title based on the quitclaim deed, although it knew at the time that its action was frivolous. TXO's real reason for filing the action was to reduce its royalty payments under its agreement with Alliance. The trial court dismissed TXO's action based on the wording of the 1958 deed alone, holding that that deed made the quitclaim deed a nullity. On Alliance's counterclaim for slander of title, the jury awarded it $19,000 in actual damages—the cost of defending the quiet title action—and $10 million in punitive damages. There was evidence that TXO was a large company in its own right, that it was a wholly owned subsidiary of an even larger company, that the amount of royalties that it sought to renegotiate was substantial, and that it had engaged in similar nefarious activities in its business dealings in other parts of the county. *TXO*, 509 U.S. at 449-51, 113 S.Ct. 2711. The trial court refused to reduce the amount of punitive damages, and the West Virginia Supreme Court affirmed. *Id.* at 452, 113 S.Ct. 2711.

On *certiorari*, the United States Supreme Court affirmed the judgment, with Justice Stevens writing the plurality opinion. Chief Justice Rehnquist and Justice Blackmun joined in full, and Justice Kennedy did so in part. Justice Kennedy also wrote a concurrence, as did Justice Scalia, with whom Justice Thomas joined. The remaining justices joined Justice

O'Connor's dissent. The plurality first noted that, assuming that the lower courts followed fair procedures, a judgment that is a product of that process is entitled to a strong presumption of validity. It also noted that comparisons with other awards of punitive damages are difficult because no two cases are truly identical. *TXO*, 509 U.S. at 456-57, 113 S.Ct. 2711. It quoted the Court's statement in *Haslip* that it is not possible to draw a mathematical bright line between acceptable and unacceptable awards but that a general concern for reasonableness certainly enters into the calculation. *Id.* at 458, 113 S.Ct. 2711.

In evaluating whether the award in *TXO* was grossly excessive, the plurality first rejected the defendant's emphasis on the fact that the award was 526 times the amount of the actual damages that the jury awarded. Although the plurality agreed that punitive damages should bear a reasonable relationship to compensatory damages, it agreed with a previous West Virginia Supreme Court case in which that court pointed out that the ratio between the dollar amounts of compensatory and punitive damages is only one of several factors for evaluating that relationship. Among the other factors that the West Virginia court identified was the relationship between the harm that was likely to occur from the defendant's conduct as well as the harm that actually occurred. *TXO*, 509 U.S. at 459-60, 113 S.Ct. 2711.

The jury could have found in *TXO* that the defendant would have avoided millions of dollars in royalty payments if it had successfully attacked the plaintiff's title. The plurality said that, even if the amount of savings were only $1 million, the award of punitive damages would not jar its sensibilities.

TXO, 509 U.S. at 461-62, 113 S.Ct. 2711. It reasoned:

> "The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of petitioner, the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and petitioner's wealth, we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow."

Id. at 462, 113 S.Ct. 2711 (footnote omitted). In its instructions to the jury, the trial court also authorized it to take into account the defendant's wealth in assessing punitive damages, recognizing that deterrence may require a larger fine for a defendant of larger means than it would for a defendant of ordinary means. The *TXO* plurality recognized that emphasizing the wealth of the wrongdoer increased the risk that the award would be influenced by prejudice against a large corporation, especially one from outside the state. However, it noted that in *Haslip* it had referred to the financial condition of the defendant as a factor in assessing punitive damages. *Id.* at 463-64, 113 S.Ct. 2711.

In his concurrence, Justice Kennedy objected to the plurality's reliance on general reasonableness as the basis for evaluating the constitutionality of the award. He thought that it was more manageable to focus not on the amount of the award but on the jury's reasons for making the award:

> "The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not

> concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions. Rather, its fundamental guarantee is that the individual citizen may rest secure against arbitrary or irrational deprivations of property. When a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deterrence and retribution, the Constitution has been violated, no matter what the absolute or relative size of the award."

TXO, 509 U.S. at 467, 113 S.Ct. 2711 (Kennedy, J., concurring). He did not agree with the plurality that a rational relationship between the size of the award and the harm that the defendant's conduct threatened was an adequate basis for concluding that the award was rational because the record did not indicate that that was the basis on which the case was presented to the jury. He was concerned that the record suggested, as the dissent argued, that the verdict was the result of redistributionist impulses arising from antipathy to a wealthy, out-of-state corporation. Justice Kennedy concluded, however, that the verdict was permissible, primarily because the defendant acted with malice; the evidence of "deliberate, wrongful conduct" was sufficient to show that the jury was motivated by a legitimate concern to punish and deter the defendant. *Id.* at 468-69, 113 S.Ct. 2711 (Kennedy, J., concurring). Justice Kennedy observed:

> "There was ample evidence of willful and malicious conduct by TXO in this case; the jury heard evidence concerning several prior lawsuits filed against TXO accusing it of similar misdeeds; and respondents' attorneys in-

> formed the jury of TXO's vast financial resources and argued that TXO would suffer only as a result of a large judgment."

Id. at 469, 113 S.Ct. 2711 (Kennedy, J., concurring).

Justice Scalia, joined by Justice Thomas, concurred on the ground that due process required only that there be fair procedures for making and reviewing an award of punitive damages. Because the West Virginia courts properly instructed the jury and properly reviewed its verdict for reasonableness, he agreed that it should be affirmed.[2] *TXO*, 509 U.S. at 470-72, 113 S.Ct. 2711 (Scalia, J., concurring).

In her dissent, Justice O'Connor argued that the record showed that the verdict was based on prejudice against a wealthy outside corporation and constituted a windfall to the plaintiff based on the jury's desire to redistribute that wealth. *TXO*, 509 U.S. at 490-91, 113 S.Ct. 2711 (O'Connor, J., dissenting). She did not argue, however, that consideration of a defendant's wealth is impermissible. Rather, she said that courts simply need to recognize the special dangers involved when they review jury verdicts. *Id.* at 491-92, 113 S.Ct. 2711 (O'Connor, J., dissenting).

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[2] The Court subsequently followed Justice Scalia's suggestions concerning procedural requirements. In *Honda Motor Co. v. Oberg*, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994), it held that the Due Process Clause requires post-verdict review of punitive damage awards for excessiveness. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), it required appellate courts to determine whether an award of punitive damage is excessive without giving any deference to the trial court's decision on that issue. Our review of the award in this case is consistent with those procedural decisions.

TXO was followed by *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (*Gore*), a 5-4 decision. It became the first case in which the Court held that an award of punitive damages was excessive. In *Gore*, the jury awarded Gore, the plaintiff, $4,000 in actual damages and $4 million in punitive damages for BMW's conduct in representing that the car that it sold to him was new despite presale damage that required repainting the car at a cost of $601. BMW had a policy of not telling purchasers about presale repairs that cost less than three percent of the value of the vehicle. Gore produced evidence that the repair reduced the value of his car by $4,000, which was ten percent of its cost as new. He also produced evidence that between 1983 and the time of trial, the defendant had sold 983 cars, including 14 in Alabama, representing them to be new cars without disclosing that they had been repainted at a cost of more than $300 per vehicle. Gore calculated his request for punitive damages of $4 million by multiplying his $4,000 actual damages by the approximately 1,000 cars that the defendant had sold. *Gore*, 517 U.S. at 563-65, 116 S.Ct. 1589.

On appeal, the Alabama Supreme Court applied the criteria that the United States Supreme Court had approved in *Haslip* and held that the award was not excessive. However, the Alabama court concluded that the jury improperly included BMW's conduct in other jurisdictions in calculating the amount of punitive damages. It therefore reduced the amount of those damages to $2 million. The court based its conclusion on a belief that that amount was a constitutionally reasonable amount based on its comparative analysis both of other Ala-

bama cases and of cases from other jurisdictions that involved a seller's misrepresentation of the condition of an automobile. *Gore*, 517 U.S. at 566-67, 116 S.Ct. 1589.

The United State Supreme Court first agreed with the Alabama court that the state had no authority to penalize a defendant for conduct in other jurisdictions that was legal where it occurred and that had no effect on Alabama residents. *Gore*, 517 U.S. at 568-73, 116 S.Ct. 1589. It did recognize, however, that evidence of out-of-state conduct may be relevant for determining the reprehensibility of a defendant's conduct. *Id.* at 574 n. 21, 116 S.Ct. 1589. The Court then concluded that the punitive damages award, even with the Alabama court's reductions, was grossly excessive. The Court's focus in evaluating the award was on whether the defendant received fair notice, not only of the conduct that could subject it to punishment but also of the severity of the penalty. *Id.* at 574, 116 S.Ct. 1589. It relied on three guideposts for deciding that issue:

> "[T]he degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."

Id. at 575, 116 S.Ct. 1589.

According to the *Gore* Court, the reprehensibility of the defendant's conduct is the most important indication of the reasonableness of an award of punitive damages; some wrongs are more blameworthy than others. Trickery and deceit or repeated misconduct, for example, are more reprehensible than mere

negligence. *Gore*, 517 U.S. at 575-76, 116 S.Ct. 1589. In *Gore*, however, none of the factors associated with particularly reprehensible conduct was present. The harm that BMW inflicted was purely economic in nature. Although Gore argued that BMW's actions were part of a nationwide pattern of tortious conduct, the Court concluded that there was no reason for BMW to know that its actions violated applicable statutes or common-law rules in other states. In addition, there was no evidence that BMW had acted in bad faith when it predetermined the amount of repairs to a new car that, in its view, required disclosure before sale. Also, there was no evidence that it had made deliberate false statements, committed affirmative misconduct, or had concealed evidence of an improper motive. Thus, the Court concluded that no circumstances existed that are ordinarily associated with egregiously improper conduct. *Id.* at 576-80, 116 S.Ct. 1589.

Although it said that reprehensibility is the most important factor in assessing of the reasonableness of an award, the Court commented that the second guidepost, the ratio between the award and the actual harm inflicted on the plaintiff, is probably the most often cited. It noted that early English statutes often provided for double, treble, or quadruple damages for particular wrongs and that, in *Haslip*, it had suggested that an award that was more than four times the compensatory damages might be close to a constitutional violation. It then pointed out that the plurality in *TXO* had refined the issue by holding that the proper inquiry is the ratio between the punitive damages award and the harm likely to result from the defendant's conduct, not simply the harm

that had occurred.[3] *Gore*, 517 U.S. at 580-81, 116 S.Ct. 1589.

In contrast to prior cases, the $2 million award in *Gore* was 500 times the amount of Gore's actual harm, and there was no indication that he was threatened with any additional potential harm. Assuming that the other 13 Alabama consumers suffered the same loss, the award was 35 times the total loss suffered by Alabama consumers. However, the Court rejected the idea that the constitutional line is marked by a simple mathematical formula, even one that compared actual and potential damages with the punitive award. For example, low awards of compensatory damages might support a higher ratio than high compensatory awards, particularly when a particularly egregious act resulted in relatively low economic damages or when injury is hard to detect or the monetary value of noneconomic harm is difficult to determine. *Gore*, 517 U.S. at 582-83, 116 S.Ct. 1589. Nevertheless, a ratio of 500 to 1 at least raised "a suspicious judicial eyebrow" for the Court. *Id.* at 583, 116 S.Ct. 1589 (citation omitted).

The third guidepost for determining excessiveness involves comparing the award of punitive damages to the civil or criminal penalties that are available for the defendant's conduct. The purpose of this guidepost is to allow the reviewing court to give substantial deference to the legislative judgment about appropriate sanctions. The $2 million award in *Gore* was substantially greater than fines in Alabama or elsewhere for similar misconduct. None of those

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[3] The Court treated that portion of the plurality opinion in *TXO* as stating the holding of the Court.

sanctions gave BMW notice that the first violation—or even the first 14 violations—could lead to a multimillion dollar penalty. There was also no reason to assume that a penalty of that size was necessary in order to motivate the defendant to change its policy, as it did after the verdict in this case. The Court assumed that the undisclosed damage and repainting affected the value of Gore's car and of the 13 other similar BMWs in Alabama and that those cars would lose their attractive appearance more rapidly than other BMWs, but it was not willing to accept the Alabama court's conclusion that BMW's conduct was sufficiently egregious to justify a punitive sanction that was equivalent to a severe criminal penalty. Moreover, the fact that BMW was a large corporation did not diminish its entitlement to fair notice of the demands that the several states imposed on it; indeed, its status implicated the federal interest in preventing undue burdens on interstate commerce. *Gore*, 517 U.S. at 583-85, 116 S.Ct. 1589.

Justice Breyer, along with two of the other justices who joined the majority opinion in *Gore*, concurred. He emphasized the need for proper standards for reviewing an award of punitive damages and concluded that the standards that the Alabama court had applied were so vague and open ended as to risk arbitrary results. In his view, those standards provided no basis for distinguishing between conduct that warrants a small award and conduct that would justify a very large award, and he thought that the Alabama courts had applied them in ways that did not in fact limit the amounts awarded. *Gore*, 517 U.S. at 586-89, 116 S.Ct. 1589 (Breyer, J., concurring). He also believed that BMW's financial status was offered into evidence

simply to provide an open-ended basis for inflating an award against a wealthy defendant. Although the use of that factor was not unlawful or inappropriate *per se*, he said that it could not make up for the failure of other factors, such as reprehensibility, to constrain an award. *Id.* at 591, 116 S.Ct. 1589 (Breyer, J., concurring). He faulted the Alabama courts for not applying any economic theory in evaluating the award and explained that the award, in his view, did not exemplify any community understanding or historic practice. *Id.* at 592-94, 116 S.Ct. 1589 (Breyer, J., concurring). Because Alabama's legal standards offered virtually no constraint on jury awards, and because of the severe disproportion between the award and legitimate objectives for punitive damages, Justice Breyer agreed both with the Court's decision to scrutinize the award and with its conclusion that the award was grossly excessive and therefore unconstitutional. *Id.* at 596-97, 116 S.Ct. 1589 (Breyer, J., concurring).

Gore provided the framework for our initial opinion in this case. Our opinion followed the Oregon Supreme Court's holding in *Parrott*. In that case, the court applied the above-mentioned cases to a claim made under the Unlawful Trade Practices Act (UTPA), which expressly authorizes punitive damages for a violation of the statute. ORS 646.608(1)(e), (g), (t); ORS 646.638(1). The defendant, Carr Chevrolet, had been found to have knowingly misrepresented the status of the title and a number of other aspects of a vehicle that it had sold to the plaintiff. According to the evidence, those actions were part of Carr's normal business practices. The jury awarded the plaintiff compensatory damages of $11,496 and punitive damages of $1 million.

The trial court reduced the punitive damages award to $50,000; on appeal, this court partially restored the award to $300,000. *Parrott v. Carr Chevrolet, Inc.*, 156 Or.App. 257, 965 P.2d 440 (1998). The Oregon Supreme Court, after evaluating the Gore guideposts together with the "rational juror" criteria that the court had previously identified in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8 (1995), *cert. den.*, 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996), reinstated the jury's verdict in its entirety. It emphasized that, at least for the purposes of *Parrott*, both the *Gore* criteria and the rational juror standard were based entirely on federal law; at least before the adoption in 1995 of *former* ORS 18.537(2) (1995), *renumbered as* ORS 31.730(2)(2003),[4] there was no basis in Oregon law for challenging an award of punitive damages if there was any evidence to support an award. *See Parrott*, 331 Or. at 551-65, 17 P.3d 473.

Applying its understanding of *Gore*, the Oregon Supreme Court identified in *Parrott* five criteria for determining the range of punitive damages that a rational juror would be entitled to award: (1) the statutory and common-law facts that allow an award for the claim at issue; (2) the state interests that the award would serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for similar misconduct. The latter three criteria are the *Gore* guideposts. The second criterion also came from

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[4] *Former* ORS 18.537 codified the "rational juror" standard that the Oregon court described in *Oberg*, making it part of state law. It became effective after the events at issue in *Parrott*.

Gore, while the first criterion came from the court's previous discussion in *Oberg*. *Parrott*, 331 Or. at 555, 17 P.3d 473. After examining the facts in *Parrott*, the court stated that the case presented an extremely egregious violation of the UTPA. It held that punishing the defendant for misconduct in Oregon and deterring it from additional such conduct furthered a significant state interest. In its view, the defendant's misconduct was far more serious than that of the defendant in *Gore*, in part because it involved intentional affirmative misrepresentations of material facts and, in part, because the defendant's conduct was part of its ordinary business practices. *Id.* at 560-62, 116 S.Ct. 1589.

The *Parrott* court then turned to the relationship between the actual or potential harm and the punitive damages award. It noted that analyzing that relationship required a consideration of the harm that was likely to result, as well as the harm that actually resulted. Because the defendant's conduct was a routine part of its business practices, the court considered the potential injury that those practices caused to past, present, and future customers. In that light, the 87-to-1 ratio between the punitive and compensatory damages did not raise any constitutional concerns. *Parrott*, 331 Or. at 562-63, 17 P.3d 473. Finally, the court noted that the civil penalties for Carr's conduct could include injunctive relief and the loss of its business license. Those penalties could have potentially serious economic consequences for Carr. *Id.* at 563-64, 17 P.3d 473. For all of those reasons, the court reinstated the full amount of the punitive damages award. In turn, in light of *Parrott*, we reinstated the jury's award of punitive damages in this case. *Williams*, 182 Or.App. at 70-74, 48 P.3d

824. With that background, we turn to the Court's decision in *State Farm*, which was decided after the Oregon Supreme Court ruled in *Parrott* and which has prompted the remand of this case to us.

Curtis Campbell, one of the plaintiffs in *State Farm*, negligently caused an automobile accident that resulted in the death of another driver and the permanent disability of a third driver. The injured driver and the deceased driver's estate sued Campbell. State Farm Mutual Insurance Company (State Farm) was Campbell's liability insurer; its policy limits were $25,000 per claimant, for a total of $50,000. Although investigators and witnesses reached a consensus that Campbell's negligence was the cause of the accident, State Farm decided to contest liability and refused offers from the injured parties to settle for the policy limits. Before trial, it assured Campbell and his wife that they had no reason to be concerned and that it would represent their interests. After the jury returned a verdict for $185,849, State Farm told them to put "for sale" signs on their house and refused to post a supersedeas bond in order for Campbell to appeal the judgment. Campbell managed to appeal on his own, and State Farm paid the judgment after the appellate court affirmed it. During the course of the appeal, Campbell and his wife reached an agreement with the injured parties under which the injured parties agreed not to seek satisfaction of their claims from the Campbells personally and under which the Campbells agreed to pursue a bad faith action against State Farm. *State Farm*, 538 U.S. at 412-14, 123 S.Ct. 1513.

The Campbells filed an action against State Farm. The trial court held a bifurcated trial. At the end of the first portion of the trial, the jury found

that State Farm's decision not to settle was unreasonable because there was a substantial likelihood of an excess verdict. During the second part of the trial, the Campbells introduced evidence that State Farm's response to the claims against them was the result of a national program ("Performance, Planning and Review," or "PP & R") designed to cap payments on claims throughout the company. The evidence offered related to State Farm's business practices over a 20 year period in numerous states; most of it had no relationship to third-party insurance claims. State Farm countered with evidence that its decision to take the case to trial was simply an honest mistake. However, the jury awarded compensatory damages of $2.6 million and punitive damages of $145 million to the Campbells. The trial court reduced the awards to $1 million in compensatory damages and $25 million in punitive damages. On appeal, the Utah Supreme Court, applying the *Gore* guideposts, reinstated the original punitive damages award. In evaluating the reprehensibility of State Farm's conduct, it emphasized the evidence concerning the PP & R policy. The court also relied on State Farm's massive wealth and reasoned that, because of the clandestine nature of State Farm's conduct, the chance of punishment in any specific case was extremely small. *State Farm*, 538 U.S. at 414-16, 123 S.Ct. 1513.

In reviewing the Utah court's decision, the United States Supreme Court first restated its concerns about excessive punitive damages. It observed that the primary danger in such awards is their potential to deprive a person of property arbitrarily without fair notice and without furthering any legitimate purpose of punishment or deterrence. It

stated that an award that is grossly excessive furthers no legitimate purpose and constitutes an arbitrary deprivation of property. The Court said that defendants subject to civil punitive damages do not have the same protections as defendants in a criminal case; among other things, jury instructions typically are vague and leave juries with broad discretion in choosing the amount to award, and evidence of a defendant's net worth creates the potential for bias against large businesses. Such concerns, according to the Court, increase when the decision-maker is presented with evidence that has little bearing on the amount that it should award. Based on those concerns, the Court proceeded to apply *Gore* guideposts to the case before it. *State Farm*, 538 U.S. at 416-18, 123 S.Ct. 1513.

With regard to the reprehensibility of State Farm's conduct, the Court summarized the factors that it had previously identified in *Gore* as whether

> "the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident."

State Farm, 538 U.S. at 419, 123 S.Ct. 1513 (citation omitted). The Court agreed that State Farm's conduct toward the Campbells did not merit any praise. In fact, State Farm employees had altered the company's records to make Campbell appear less culpable in the underlying accident, the company had dis-

regarded the overwhelming likelihood both of liability and of a verdict in excess of the policy limits, and, although it had first assured the Campbells that their assets would be safe, after the verdict it had told them to sell their house. Thus, State Farm's conduct was reprehensible enough to support an award of punitive damages in some amount. *Id.* at 419-20, 123 S.Ct. 1513.

The problem, however, in the case, according to the Court, was that the Campbells and the Utah courts had used State Farm's conduct in that case as a platform to expose and punish perceived deficiencies in State Farm's operations throughout the country concerning matters that had no relationship to its conduct in regard to the Campbells. In reinstating the jury's award, the Utah Supreme Court had emphasized evidence that the way that State Farm had treated the Campbells was simply one application of its nationwide PP & R policy. In doing so, according to the Court, the Utah court had improperly relied on evidence of dissimilar acts and of acts that were lawful in the states in which they occurred. The Court said that a state generally does not have a legitimate interest in punishing even unlawful acts committed outside of the state's jurisdiction. *State Farm*, 538 U.S. at 420-22, 123 S.Ct. 1513. It explained:

> "A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction."

Id. at 422, 123 S.Ct. 1513 (citation omitted). That does not mean, the Court continued, that lawful out-of-state conduct is always irrelevant. Indeed, such "conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff." *Id.*

In the Court's view, the Campbells demonstrated little evidence of repeated misconduct by State Farm of the kind that injured them. *State Farm*, 538 U.S. at 423, 123 S.Ct. 1513. The Court concluded that, "because the Campbells have shown no conduct by State Farm similar to that which harmed them," the only relevant conduct was State Farm's treatment of the Campbells themselves. *Id.* at 424, 123 S.Ct. 1513. The limited evidence of State Farm's conduct that the jury could properly consider made that conduct far less reprehensible than the Utah court had believed it to be.

The Court turned next to the second *Gore* guidepost, the relationship between State Farm's conduct and the size of the award. It observed that the "precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* at 425, 123 S.Ct. 1513. The Court did not reject the 145-to-1 ratio between the Campbells's compensatory damages and the award of punitive damages out of hand. Rather, it stated that the ratio gave rise to a presumption of constitutional invalidity and that the other considerations that it had identified did not overcome that presumption. It considered the fact that the Campbells had received $1 million as full compensation for a year and a half of emotional dis-

tress. Also, because State Farm paid the excess verdict before the Campbells filed their bad faith action, they had suffered only minor economic injuries. Their emotional harm thus arose from an economic transaction, not from a physical assault or trauma, and they had suffered no physical injuries. Moreover, in the Court's view, the compensatory and punitive damages partially overlapped because the compensatory damages included compensation for the emotional distress that State Farm had caused, a factor that the Court believed was also a basis for the punitive damage award. Although the Utah court had stated that State Farm's policies had affected many other Utah consumers, the Campbells were unable to point to evidence in the record demonstrating harm to anyone other than those involved in the case. Finally, the Court observed that State Farm's great wealth did not support an otherwise unconstitutional award, in part because the purpose of much of that wealth was to enable State Farm to pay the claims of its policyholders and in part because wealth by itself cannot make up for the failure to satisfy other guideposts, such as reprehensibility, to justify an award. *Id.* at 426-28, 123 S.Ct. 1513.

With regard to the third *Gore* guidepost, the disparity between the punitive damages award and potentially applicable civil penalties, the Court modified its previous reliance on criminal penalties, suggesting that, although the existence of a criminal penalty bears on the seriousness with which the state views wrongful conduct, it is less useful in evaluating the amount of a punitive damages award. A state can impose criminal penalties only after providing the protections that the criminal process entails; the remote possibility of a criminal sanction

does not automatically sustain a punitive damages award. In any event, the only relevant Utah statutory penalty appeared to be a $10,000 fine for an act of fraud, an amount dwarfed by the punitive award of $145 million. The Court concluded that the evidence would sustain a punitive award only at or near the amount of compensatory damages, but it left the precise amount for the Utah courts to resolve in the first instance. *State Farm*, 538 U.S. at 428-29, 123 S.Ct. 1513.

We have previously applied *State Farm* to two cases involving punitive damages, each on remand from the United States Supreme Court. *Bocci v. Key Pharmaceuticals, Inc.*, 189 Or.App. 349, 76 P.3d 669, *modified on recons.*, 190 Or.App. 407, 79 P.3d 908 (2003); *Waddill v. Anchor Hocking, Inc.*, 190 Or.App. 172, 78 P.3d 570 (2003). In *Bocci*, the plaintiff Bocci took a prescription drug for asthma that the defendant Key Pharmaceuticals (Key) promoted as a safe product. He then took an antibiotic for a skin rash without telling the prescribing physician about his consumption of the asthma drug. When he began experiencing what proved to be toxicity from the asthma drug, he saw Edwards, a physician, for diagnosis and treatment. Because Key had promoted the asthma drug as safe, Edwards did not recognize Bocci's symptoms as toxicity to that drug. As a result, Edwards simply sent Bocci home; soon afterwards Bocci began experiencing seizures and ultimately suffered serious permanent injuries. He sued both Key and Edwards, and Edwards filed a cross-claim against Key. The jury awarded Bocci significant compensatory and punitive damages and awarded Edwards compensatory damages of $500,000 and punitive damages of $22.5 million. The

jury expressly found that Key was negligent with respect to Edwards, that it had made fraudulent misrepresentations to him, that it had knowingly withheld or misrepresented information concerning the drug's toxicity to the Food and Drug Administration or prescribing physicians, and that it had acted with wanton disregard for the safety of others. 189 Or.App. at 352-53, 76 P.3d 669.

When we first considered the award of punitive damages in *Bocci*, before the decision in *State Farm*, we applied *Parrott* and affirmed the award. *Bocci v. Key Pharmaceuticals, Inc.*, 178 Or.App. 42, 35 P.3d 1106 (2001). On remand from the Court after its decision in *State Farm*, we reevaluated the jury's award in light of the *Gore* guideposts as the Court had refined them in that case. We began with the first guidepost, the reprehensibility of Key's conduct, and considered the various factors that the Court had identified in *State Farm*. We rejected Key's argument that we should ignore evidence that did not directly relate to Edwards's claim. Unlike in *State Farm*, where the evidence of other harm involved dissimilar acts that bore no relation to the harm that the Campbells suffered, Key's actions toward Bocci were the same acts that caused harm to Edwards. In addition, we rejected Key's argument that we should ignore the evidence of its out-of-state promotional activities. Although the Court in *State Farm* had rejected the Campbells' evidence of State Farm's unrelated misconduct, it also had recognized the relevance of repeated out-of-state misconduct of the same sort that injured the plaintiff. We concluded that it was appropriate for the jury to consider evidence that Key had engaged in a nationwide dissemination of false and misleading information and

that that conduct had led to Bocci's and Edwards's damages. *Bocci*, 189 Or.App. at 356-58, 76 P.3d 669.

The harm that resulted from Key's conduct was physical and economic harm to Bocci as well, and Key's actions demonstrated an indifference to or reckless disregard of the health and safety of others. Neither party addressed the factor of the victim's financial vulnerability, but it was clear that Key's actions were repeated as opposed to isolated incidents of misconduct. In addition, Key knowingly withheld or misrepresented information concerning the toxicity and safety of the drug. Thus, there was evidence of four of the five factors for determining reprehensibility that the Court had applied in *State Farm*. *Bocci*, 189 Or.App. at 358-59, 76 P.3d 669.

We next discussed the relationship between the harm or potential harm to the plaintiff and the punitive damages award. We recognized that the Court had suggested that the ratio between compensatory and punitive damages should ordinarily be in single digits and that a ratio greater than 4 to 1 might be questionable. The ratio of the punitive damage award to the award of compensatory damages in *Bocci* exceeded single digits, which raised questions about the award. Although we held that Key's conduct did not rise to the level of " 'particularly egregious,' intentionally malicious acts that would justify a ratio in excess of single digits," it was sufficiently malicious that it justified a ratio greater than 4 to 1. *Bocci*, 189 Or.App. at 359-61, 76 P.3d 669. We ulti-

mately concluded that a ratio of 7 to 1, or an award of $3.5 million, was constitutionally permissible.[5]

Waddill was a personal injury case in which the plaintiff was severely injured when a glass fishbowl shattered while she was carrying it filled with water. Although Anchor Hocking, the defendant manufacturer, had learned of similar incidents, it had not retained records of them and had failed to use those incidents to improve the safety of its product. It had not even added a simple warning of the dangers of carrying a fish bowl with water in it. The jury awarded Waddill compensatory damages of $132,472 (which the court reduced to $100,854 to reflect the jury's finding that the plaintiff was 25 percent at fault) and punitive damages of $1 million. *Waddill*, 190 Or.App. at 178-79, 78 P.3d 570. We originally affirmed, *Waddill v. Anchor Hocking, Inc.*, 175 Or.App. 294, 27 P.3d 1092 (2001), *rev. den.*, 334 Or. 260, 47 P.3d 486 (2002), but the Court vacated our decision and remanded for reconsideration in light of *State Farm*.

On remand, we concluded that Anchor Hocking was indifferent to or recklessly disregarded the health and safety of its customers. However, the evidence of repeated conduct was weak, and there was no evidence that Anchor Hocking had acted with intentional malice or had engaged in fraudulent conduct or deceit. We concluded that Anchor Hocking's actions were sufficiently egregious to justify an award of punitive damages, but they were not as egregious as those of the defendant in *Bocci*. Be-

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[5] There was no relevant evidence on the third guidepost, the relationship between the award and any civil penalties authorized in similar cases. *Bocci*, 189 Or.App. at 361, 76 P.3d 669.

cause the Court indicated in *State Farm* that a ratio of 4 to 1 was close to the constitutional ceiling, and because there was nothing unusual about the facts of *Waddill*, we concluded that the maximum permissible award in *Waddill* was four times the harm that Anchor Hocking caused and reduced the punitive damages award accordingly. *Waddill*, 190 Or.App. at 182-83, 78 P.3d 570.

We turn now to the parties' argument in this case after remand by the Court. Defendant first argues that it is now clear, as a result of the Court's discussion in *State Farm*, that we erred in our previous decision when we rejected its assignment of error concerning the trial court's failure to instruct the jury that, among other things,

> "[t]he size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

(Internal quotations omitted.) Defendant states that the instruction "perfectly predicted the Supreme Court's holdings in *State Farm*." In support of its argument, it quotes the Court's statements that

> "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical

> claims against a defendant under the guise of the reprehensibility analysis"

and that punishment on the basis of harm to nonparties

> "creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains."

538 U.S. at 423, 123 S.Ct. 1513.

We briefly considered this aspect of *State Farm* in *Bocci*, in which Key argued, based on the first statement that defendant quotes, that we should not consider the harm to Bocci in evaluating the punitive damages awarded to Edwards. In response, we noted that the Court had made that statement in the context of discussing the Utah Supreme Court's reliance on what the Court described as State Farm's dissimilar acts, which, according to the Court, bore no relationship to the harm that the Campbells suffered. In *Bocci*, in contrast, there was nothing hypothetical about Bocci's claim or about the harm that Key caused him; the harm to Edwards was the result of the same acts that had caused harm to *Bocci*. We therefore rejected that argument in that case. *Bocci*, 189 Or.App. at 357-58, 76 P.3d 669.

In this case, there is evidence concerning other Oregon victims of defendant's decades-long fraudulent scheme. The tobacco industry and defendant directed the same conduct toward thousands of smokers in Oregon. They all received the same representations, from the same entities, and through the same media, and the industry intended to induce Oregon smokers to act on those representations in

the same way. That conduct was a fundamental part of defendant's business strategy; Williams was simply one of its many Oregon victims. In that sense, this case is more like *Gore* than like *State Farm*. In *Gore*, there was evidence of BMW's identical misconduct toward 13 other people in Alabama that the Court considered relevant. Under the facts of this case, the evidence of injury to others is not an attempt to blacken defendant's reputation in general, but, rather, it describes the consequences to other Oregonians resulting from the very actions that harmed plaintiff. Thus, we are not persuaded by defendant's argument that we erred in our previous decision when we rejected its argument that the trial court erred by failing to instruct the jury that it could not punish defendant for the impact of its misconduct on others.

In addition, as we noted in our original opinion, ORS 30.925(2)(g) requires a jury to consider evidence of punishments already imposed on the defendant when it considers the amount of an award of punitive damages. As a result, the Court's concern in *State Farm* about multiple punitive damages awards that would be excessive in total is ameliorated by Oregon law. By introducing evidence of this award in future cases, defendant can ensure that both juries and courts will adjust any future award to account for this one. Contrary to the usual situations on which the Court based its statement, the judgment in this case will protect defendant from an excessive judgment in a future case, even if it may not be legally binding on future parties. For both of those reasons, we believe that the holding in *State Farm* does not affect our previous conclusion that "the potential injury to past, present, and future consumers as the

result of a routine business practice is an appropriate consideration in determining the amount of punitive damages." *Williams*, 182 Or.App. at 64, 48 P.3d 824.[6]

We now turn to the primary issue before us, whether the jury's award is consistent with the *Gore* guideposts as the Court refined them in *State Farm*. As an initial matter, in general, the State of Oregon has a legitimate interest in punishing defendant and deterring it from further misconduct. *See Gore*, 517 U.S. at 568-69, 116 S.Ct. 1589 (discussing the state's interest regarding punitive damage awards).[7] In *Gore*, those interests were limited by, among other things, the nature of the harm (economic) and the diversity of state approaches to dealing with deceptive trade practices. In this case, the state's interests are at their maximum; they involve the protection of the health and lives of its citizens. *See Williams*, 182 Or.App. at 68-69, 48 P.3d 824. Defendant does not suggest that there is any diversity among states concerning the importance of that kind of interest.

The first *Gore* guidepost concerns the reprehensibility of defendant's conduct. In our view, this case involves conduct that is more reprehensible than

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[6] As plaintiff points out, defendant's proposed instruction is also confusing, and the trial court could properly have refused to give it for that reason. The instruction would have informed the jury both that it *may* consider the harm to others in determining the reasonable relationship of its award to the harm caused to Williams and that it *may not* punish defendant for the impact of its misconduct on others.

[7] *See also* ORS 31.735 (providing for the distribution of punitive damages between prevailing parties and the State of Oregon).

that in any of the cases that we have discussed. As we have said, the jury could have found the following facts from the evidence before it. Defendant sold a product that it knew would cause death or serious injury to its customers when they used it as defendant intended them to use it. Despite that knowledge, defendant, together with the rest of the tobacco industry, engaged in an extensive campaign to convince smokers that the issue of cigarette safety was unresolved. It insisted that more research was necessary at the very time that it was carefully avoiding doing the very research for which it called, although it had an extensive program of research into other issues. Rather, it used its research to determine the optimum dose of nicotine in each cigarette, knowing of, but publicly denying, nicotine's highly addictive properties. Defendant also knew that, because of those addictive properties, it would be difficult for smokers to quit smoking, and it relied on its fraudulent message to discourage them from doing so. The result, as defendant hoped, was that addicted smokers remained addicted and purchased more of its product. In short, defendant used fraudulent means to continue a highly profitable business knowing that, as a result, it would cause death and injury to large numbers of Oregonians.

We held in *Bocci* that Key's conduct of disseminating false and misleading information about its drug throughout the nation was especially reprehensible and justified a greater award. Key's drug was, however, potentially useful in the treatment of a serious disease, and there was no evidence that Key routinely engaged in that misconduct with regard to its products. In comparison, defendant's actions in this case are far more egregious than Key's actions in

Bocci, considering the length of time over which the conduct occurred, the number of business entities involved, the express intention to mislead consumers, the number of people harmed, and in almost every other aspect of what defendant did. That difference in magnitude of harm places this case in a different class from the cases that we have described. Here, the harm caused was physical rather than economic and, for Williams, the most serious physical harm possible, his death. Defendant's conduct not only shows a reckless disregard of the safety of others but conduct with knowledge that others would be harmed by its actions. Moreover, defendant's fraud was motivated by economic considerations. In other words, the jury could have found that defendant misrepresented the safety of its product for its own pecuniary gain, gain that it would not otherwise have achieved but for the misrepresentation. There is no evidence concerning the third factor, whether Williams was financially vulnerable. The fourth factor is whether the conduct involved repeated actions or was simply an isolated incident. Not only did defendant's conduct involve repeated actions, those actions were directed at Oregon citizens over a period of 40 years. The fifth factor is whether the harm was the result of intentional malice, trickery, or deceit or simply an accident. Here, defendant intentionally misled the Oregon public regarding the results of its research and increased the nicotine in its products to make them more addictive and more dangerous. Thus, in our view, four of the five *Gore* factors exist in this case.[8]

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[8] Defendant argues that Oregon cannot punish it for conduct that was lawful where it occurred or for selling a lawful prod-

The second *Gore* guidepost is "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award [.]" *State Farm*, 538 U.S. at 418, 123 S.Ct. 1513. For purposes of guidance, we quote extensively from the Court's opinion in *State Farm*:

> "Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U.S. at 582, 116 S.Ct. 1589 ('[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award'); *TXO*, *supra*, at 458, 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S. at 23-

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uct. First, all of the out-of-state conduct that we discuss led to actions within Oregon or that were directed to Oregonians; Oregon has the authority to punish defendant for such conduct. Second, the punitive damages award was based not simply on defendant's selling cigarettes but on its using fraudulent and deceptive means in order to do so.

24, 111 S.Ct. 1032. We cited that 4-to-1 ratio again in *Gore*, 517 U.S. at 581, 116 S.Ct. 1589. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. *Id.* at 581, and n. 33, 116 S.Ct. 1589. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, 116 S.Ct. 1589 or, in this case, of 145 to 1.

"Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' *Ibid.*; see also *ibid.* (positing that a higher ratio *might* be necessary where 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine'). The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the de-

> fendant's conduct and the harm to the plaintiff.
>
> "In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."

Id. at 424-26, 123 S.Ct. 1513 (emphasis and brackets in original).

There is no doubt that, under the holding in *State Farm*, there is a presumption of constitutional invalidity arising from the jury's award of punitive damages in this case, if there is, in fact, a 96-to-1 ratio between the compensatory and punitive damages awarded to plaintiff. We are mindful that the Court said in *State Farm* that "few awards exceeding a single-digit ratio * * * will satisfy due process" and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425, 123 S.Ct. 1513 (citation omitted). We first inquire therefore as to what is the correct amount of compensatory damages to consider for purposes of computing the ratio under the second guidepost in *Gore*. In answering that question, we are guided by the Court's decisions in *TXO* and *Gore*.

In *TXO*, the plurality writing for the Court took into consideration the respondents' actual damages and the potential damage that could have been caused by its conduct, had TXO's fraudulent scheme succeeded:

> "It is appropriate to consider the magnitude of the *potential harm* that the defendant's

> conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."

509 U.S. at 460, 113 S.Ct. 2711 (emphasis in original). The Court calculated the potential harm of TXO's conduct to be more than 50 times the $19,000 in actual damages that the respondents suffered. *Id.* at 459-62, 113 S.Ct. 2711 (plurality opinion). In *Gore*, the plaintiff introduced evidence that BMW had sold 14 cars in the State of Alabama without disclosing that the cars had been repainted. The Court recognized that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Gore*, 517 U.S. at 568, 116 S.Ct. 1589. Court explained that, to avoid encroachment on policy choices of other states, the economic penalties that a state inflicts must be supported by the state's interest in protecting its own consumers. Thus, the Court analyzed the reasonableness of the award of punitive damages in *Gore* based on the interests of Alabama consumers rather than those of the entire nation. *Id.* at 572-73, 116 S.Ct. 1589.

We apply those principles to the facts in this case. First, there is the harm to Williams found by the jury to amount to $21,485 in economic damages and $800,000 in noneconomic damages. Second, defendant inflicted potential harm on the members of the public in Oregon through its fraudulent promotional scheme. As we said in our previous opinion,

> "The jury could find on this record that defendant's public relations campaign had pre-

> cisely the effect that defendant intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It is also reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences."

Williams, 182 Or.App. at 67, 48 P.3d 824. As the Court did in *TXO*, the jury in assessing the amount of punitive damages was entitled to draw reasonable inferences as to the number of smokers in Oregon who had been defrauded during the past decades and would be affected in the future by defendant's conduct, if that conduct were not deterred. Based on the evidence before it, and, particularly, the pervasiveness of defendant's advertising scheme in Oregon, it would have been reasonable for the jury to infer that at least 100 members of the Oregon public had been misled by defendant's advertising scheme over a 40-year period in the same way that Williams had been misled. Such a conservative calculation of compensatory damages based on William's actual damages and the potential magnitude of damage to the public thus would cause the ratio between compensatory and punitive damages, whatever it is, to fall within *State Farm's* 4-to-1 boundary.

But even if the $79 million award is deemed to exceed a single-digit ratio, it is difficult to conceive of more reprehensible misconduct for a longer duration of time on the part of a supplier of consumer products to the Oregon public than what occurred in this

case. We think that the reprehensibility of defendant's conduct far exceeds that of *TXO* where the Court upheld a 10-to-1 ratio, or in *Bocci*, where we upheld a 7-to-1 ratio. Here, in contrast to those cases, the number of potentially defrauded and injured victims is much greater. As the *State Farm* Court stated in the above-quoted language, there are no bright-line ratios or rigid benchmarks that a punitive damage award cannot exceed. We think the unique facts in this case, when compared to the circumstances considered by the Supreme Court and this court in other cases, would justify more than a single-digit award under the Due Process Clause.

The final *Gore* guidepost examines any disparity between the punitive damages award and other penalties that the state provides for the same conduct. In our previous opinion, we noted that Oregon does not provide civil sanctions for defendant's conduct and that the criminal statutes that plaintiff mentioned were not truly comparable. *Williams*, 182 Or.App. at 72, 48 P.3d 824. Thus, this guidepost does not play a significant role in our analysis, and to the extent that the purpose of the guidepost is to give defendants notice that they may be held liable for punitive damages, ORS 30.925(2) fulfills that function.

Finally, we consider the subject of defendant's wealth and the profitability of its conduct. Although the Court in *State Farm* was concerned that the use of the factor of a defendant's wealth could lead a jury to act to redistribute wealth from a wealthy corporation to an impoverished plaintiff, the wealth of a defendant continues to be an appropriate consideration. *State Farm*, 538 U.S. at 427-28, 123 S.Ct. 1513. In this case, the evidence was that, at the time of

trial, defendant's net worth was over $17 billion and defendant's profit for the most recent year for which figures were available was $1.6 billion. *Williams*, 182 Or.App. at 67, 48 P.3d 824. That evidence could be properly considered by the jury in two ways. First, the jury could have found that a large award was necessary in order to punish defendant adequately because it would treat a small award as no more than an insignificant nuisance and part of the cost of doing business. Second, the jury could have found on the evidence before it that a large award would require defendant to disgorge some of the profit that it gained over a number of decades by its misconduct directed at decedent and other Oregonians. In that light, the evidence of defendant's wealth and profits both supports the award of punitive damages and provides a proper basis for consideration by the jury.

Based on the above analysis, we conclude that an award of punitive damages in the amount of $79.5 million does not violate the Due Process Clause under the guidelines provided by *State Farm* because the amount of the award is reasonable and proportionate to the wrong inflicted on decedent and the public of this state. It follows, that, after reconsidering our previous opinion in light of *State Farm*, we believe that our original decision was correct. We therefore again reinstate the award of punitive damages as originally found by the jury.

On appeal, reversed and remanded with instructions to enter judgment on jury verdict; affirmed on cross-appeal.

APPENDIX D
[Opinion of the Oregon Court of Appeals (June 5, 2002)]

182 Or.App. 44, 48 P.3d 824

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, DECEASED, *Appellant-Cross-Respondent*,

v.

PHILIP MORRIS INCORPORATED, RESPONDENT-*Cross-Appellant*,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC., *Defendants*.

9705-03957; A106791.

Argued and Submitted Oct. 26, 2001.
Decided June 5, 2002.

James S. Coon argued the cause for appellant-cross-respondent. With him on the briefs were Raymond F. Thomas, Douglas A. Swanson, and Swanson, Thomas & Coon; William A. Gaylord, and Gaylord & Eyerman, P.C.; and Charles S. Tauman, Maureen Leonard, Kathryn H. Clarke, Portland, and Bennett, Hartman & Reynolds.

William F. Gary argued the cause for respondent-cross-appellant. With him on the briefs were

Sharon A. Rudnick, Eugene, James E. Mountain, Jr., Salem, and Harrang Long Gary Rudnick, P.C.

James N. Westwood, Portland, Scott E. Crawford, and Stoel Rives LLP, filed the brief amicus curiae for Associated Oregon Industries.

David F. Sugerman, Portland, and Paul & Sugerman, P.C., and Steven C. Berman, filed the brief amicus curiae for Alliance for Lung Cancer Advocacy, Support and Education; American Lung Association of Oregon; American Heart Association; American Cancer Society; and Oregon Trial Lawyers Association.

Before EDMONDS, Presiding Judge, and ARMSTRONG and KISTLER, Judges.

EDMONDS, P.J.

Defendant Phillip Morris, Inc., is this country's largest manufacturer of cigarettes. Plaintiff is the widow and personal representative of the estate of Jesse Williams (Williams), who began smoking defendant's cigarettes in the early 1950s and continued until his death from a smoking-related lung cancer in 1997. Plaintiff brought this action to recover compensatory and punitive damages for Williams' death. The jury found for plaintiff on her claims of negligence and fraud, awarding economic damages of $21,485.80 and noneconomic damages of $800,000 on each claim. On the negligence claim, it found that Williams' negligence was 50 percent of the cause of his harm and declined to award punitive damages. It awarded punitive damages of $79.5 million on the fraud claim. The trial court reduced the punitive damages award to $32 million, on the ground that the jury's award was excessive under the United States Constitution, and reduced the award of none-

conomic damages to $500,000 in accordance with ORS 18.560(1). *See Greist v. Phillips*, 322 Or. 281, 906 P.2d 789 (1995). It then entered judgment on the fraud claim as modified.[1] Plaintiff appeals, assigning error to the reduction of the punitive damages award. Defendant cross-appeals, assigning error to a number of rulings relating to both the fraud and negligence claims. We reverse on the appeal, affirm on the cross-appeal, and remand for the trial court to enter judgment accordingly.

Because of the jury's verdict, we state the facts most favorably to plaintiff, drawing all reasonable inferences in her favor. *Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or. 487, 490-91, 982 P.2d 1117 (1999). We first describe the facts relating to Williams himself, reserving most of the facts relating to defendant's conduct for our discussion of the various legal issues that the parties raise. Williams began smoking Phillip Morris cigarettes while he was in the Army in Korea in the early 1950s. The Army provided the cigarettes, and other soldiers told him that the smoke would help keep mosquitoes away. He smoked them until the mid 1950s, when he switched to Marlboros, another Phillip Morris brand. He made the switch about the time that defendant repositioned the Marlboro brand from one that was oriented toward women to one of the first male-oriented filter cigarettes. Williams continued to smoke Marlboros or Marlboro Lights for the rest of

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[1] The court did not reduce the award of compensatory damages on the fraud claim to reflect the jury's finding of comparative fault, which it would have done if it had based the amount of the judgment on the negligence claim. *See* ORS 18.470.

his life,[2] ultimately increasing to three packs a day. At that point he was spending half of his waking hours smoking.

Both Williams' wife and their children encouraged him to stop smoking, telling him that cigarettes were dangerous to his health. In response, he insisted that the cigarette companies would not sell cigarettes if they were as dangerous as his family claimed, and he stated that he had heard on television that cigarettes do not cause cancer. He quoted to them from what he said he had heard about why cigarette smoking was not harmful to a smoker's health. He also told his wife, "the tobacco company, they never said that anything like this is going to harm you. They never said there was anything wrong with the tobacco." When one of his sons would try to get him to read articles about the dangers of smoking, Williams would respond by finding published assertions showing that cigarette smoking is not dangerous.

Williams nevertheless made several unsuccessful attempts to stop smoking, trying various methods that included quitting "cold turkey," reducing the number of cigarettes, using nicotine patches, and using nicotine gum. He did not persist in any of those attempts for a significant time period. Williams' desire for cigarettes was so strong that, if he ran out of cigarettes during an ice storm, he would go to a store for cigarettes, despite the hazards of traveling in such conditions, even if he had no other reason to

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[2] There is some indication that Williams may have occasionally smoked other Phillip Morris brands. There is no evidence that he smoked non-Phillip Morris cigarettes other than incidentally.

leave his residence. When his wife prohibited smoking in the family home, he went outdoors to smoke. At restaurants, he would leave his wife in the nonsmoking section during the meal in order to have a cigarette in the smoking section. His smoking was the major source of tension between Williams and his wife. According to an expert witness, Williams was highly addicted to cigarettes, and that addiction was physiological as well as psychological.

Williams was generally in good health and rarely saw a physician. However, in late 1995 and early 1996, he developed a cough and began, at times, to spit up blood. A radiologist interpreted chest X-rays taken at that time as normal.[3] The problem recurred a few months later, and he began losing weight. X-rays and other tests in September and October led to a diagnosis of an inoperable poorly differentiated adenosquamous carcinoma in Williams' right lung. According to expert testimony, the primary cause of that kind of cancer is cigarette smoking.[4] When Williams learned of the diagnosis, he expressed a feeling of betrayal. He said, "those darn cigarette people finally did it. They were lying all the time." He wanted to let other people know that they were being deceived about the harm that cigarettes could do to them. Williams received chemical and radiation

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[3] Both plaintiff's and defendant's radiologists at trial agreed that, viewed in retrospect, those X-rays showed a tumor. The course of Williams' cancer would not have been different if it had been diagnosed at that time, according to the testimony.

[4] Defendant's experts testified that Williams had an extremely rare form of lung cancer that is not related to smoking. Plaintiff presented contrary evidence, and the jury by its verdict implicitly accepted plaintiff's view.

therapy that provided only temporary benefits, and he died in March 1997.

Because plaintiff's appeal relates solely to the reduction of the punitive damages award, we begin with defendant's cross-appeal. Defendant first assigns error to the trial court's denial of its motion for directed verdict on plaintiff's fraud claim. Resolving that assignment depends on understanding plaintiff's theory concerning how defendant made material misrepresentations of fact, how the misrepresentations were made to Williams, and how he relied on them. In Oregon the elements of fraud are:

> "(1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury."

Conzelmann v. N.W.P. & D. Prod. Co., 190 Or. 332, 350, 225 P.2d 757 (1950).[5] A plaintiff must prove each element of the tort by clear and convincing evidence, or evidence that establishes that the truth of the facts alleged is highly probable. *Riley Hill Gen-*

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[5] The Supreme Court has suggested that those nine requirements may unduly fractionalize the essential elements of a fraud claim. For example, proof of reliance on a fraudulent statement may be sufficient in itself to prove the hearer's ignorance of the falsity of the statement. *See Briscoe v. Pittman*, 268 Or. 604, 610, 522 P.2d 886 (1974).

eral Contractor v. Tandy Corp., 303 Or. 390, 392, 402, 737 P.2d 595 (1987).[6]

Also, the trial court held that two separate legal principles impose significant limitations on plaintiff's claims. First, ORS 30.905(1), the statute of ultimate repose, extinguishes claims for injuries that occurred more than eight years after a product is first purchased. Plaintiff therefore had to prove that the cigarettes that Williams purchased after September 1, 1988, which the parties treated as eight years before his injury, were a substantial factor in causing his cancer and death. Secondly, under 15 USC § 1334, the federally required warning that appears on each cigarette package preempts all state regulation of the advertising and promotion of cigarettes that carry the warning. In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 527-28, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992), the United States Supreme Court held that the preemption extends to state common-law claims as well as to state statutes and regulations. Thus, plaintiff may not base her fraud claim on allegations that defendant fraudulently concealed information concerning smoking and health. She is limited to allegations of affirmative misrepresentations. Neither party challenges on appeal the trial court's rulings regarding the statute of ultimate repose and the effect of 15 USC § 1334.

Defendant's primary argument on cross-appeal focuses on the first, seventh, and eighth elements of

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[6] A plaintiff may prove compensatory damages arising out of the fraud by a preponderance of the evidence. *Riley Hill General Contractor*, 303 Or. at 392-93, 737 P.2d 595. Punitive damages require proof by clear and convincing evidence. ORS 18.537(1).

fraud, involving the alleged representations and Williams' reliance on them. Defendant asserts that there is no evidence that it made *any* representation to Williams or that Williams relied on any representation that it may have made. Defendant asserts,

> "The essence of a claim of fraud is a communication by the defendant which is received and relied upon by the plaintiff. As Plaintiff acknowledged, she could not prove any such communication by Phillip Morris to Williams. Therefore her fraud claim fails."

Defendant interprets the requirement that plaintiff rely on a misrepresentation as meaning that "an alleged false representation must be identified specifically so that it can be critically examined." According to defendant, plaintiff cannot prove her claim without proof that defendant made a specific misrepresentation to Williams.

Defendant interprets the cases on which it relies for support as standing for more than they do. The cases that defendant cites either simply repeat the requirement that there be a misrepresentation, *see, e.g., Gregory v. Novak,* 121 Or.App. 651, 654, 855 P.2d 1142 (1993), or describe the required level of specificity for pleading fraud. *See, e.g., Palmberg v. City of Astoria,* 112 Or. 353, 369-70, 228 P. 107;229 P. 380 (1924). As we discuss below, a defendant may be liable for fraud for a misrepresentation that creates a false impression even though it is impossible to identify the specific misrepresentation on which a person relied.

Defendant's argument goes to the heart of plaintiff's theory of fraud. In contrast to most fraud cases, plaintiff does not rely on one or a few fraudulent

statements made to one or a few identifiable individuals. Rather, her theory is that defendant, in concert with other tobacco companies, engaged in a decades-long public-relations effort to create the impression in the public that there was a legitimate controversy about the health effects of smoking, even though defendant knew that such an impression was false. According to plaintiff's evidence, defendant sought to create enough doubt about the connection between smoking and disease that potential and actual smokers would have something to which they could point to justify beginning or continuing to smoke. In order to evaluate that theory, we first discuss the facts and legal authorities that support it, again stating the evidence in the light most favorable to plaintiff, as required by our standard of review.

The first significant publicity about the effects of cigarette smoking on health came in the early 1950s, based on studies that showed that cigarette tar could cause cancer in mice and that established statistical correlations between smoking and lung cancer. Apparently as a result, total cigarette sales fell in 1953 for the first time in the twentieth century. In response to the publicity and falling sales, defendant, in cooperation with other tobacco companies, began a concerted campaign to undercut the impact on smokers and potential smokers of concerns about the consequences of smoking. The theme of the industry's publicity campaign, which continued into the 1990s, was that the effect of cigarette smoking on health was unclear and that more research was needed before a definitive answer would be possible. As plaintiff explains in her reply brief:

> "Defendant understood that it could never prove [that] cigarettes [are] safe; it was enough, however, to make it appear that there was a legitimate controversy over the link between cigarettes and lung cancer so as to give smokers like Jesse Williams something to tell themselves while they continued smoking. The message [that] defendant communicated to Jesse Williams to create the necessary uncertainty was the message that there was doubt about the causal link between cigarette smoking and human disease."

According to plaintiff, defendant communicated this message to Williams and to smokers and nonsmokers throughout Oregon and the rest of the United States over several decades. What makes the message fraudulent, in plaintiff's view, is that defendant knew that there was no legitimate controversy about the health effects of smoking and that defendant itself had no doubt that cigarette smoking carried serious health risks, including the risk of lung cancer.

Defendant attacks both the legal and factual bases for plaintiff's theory, asserting that there "is not a shred of evidence that Williams ever saw or heard a false or misleading statement made by or attributable to Phillip Morris." Defendant emphasizes plaintiff's concession that she cannot point to a specific misrepresentation that Williams received. Rather, according to defendant, plaintiff is trying to recover for what plaintiff described to the trial court as a "fraud on the American public." Based on that understanding, defendant treats plaintiff's theory as a variation of the securities law concept of "fraud on

the market." Under that concept, a purchaser or seller of stock may recover against a party whose fraudulent statements affected the market in which the plaintiff bought or sold, even if the plaintiff never personally received or otherwise knew of the misrepresentations. *See Basic Inc. v. Levinson,* 485 U.S. 224, 248 and n. 27, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988). Defendant then describes its reasons for believing that that theory, to the degree that it is valid in the securities context, does not apply to this case.

We disagree with defendant's effort to characterize plaintiff's theory.[7] Rather, plaintiff's theory fits comfortably within traditional common-law principles.[8] Liability for fraud is not limited to those who deal directly with the injured party. Rather, a person who makes a misrepresentation may be liable to the intended recipients of a misrepresentation without regard to whether the person making the representation intends to defraud a particular person. As the Supreme Court said over 75 years ago, quoting a le-

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[7] Plaintiff's statements to the trial court on which defendant relies in support of its characterization were made in the context of her explanation that "there were so many misrepresentations, so many attempts to create false impression, * * * plaintiff cannot now point to one[.]"

[8] In its verdict, the jury answered "yes" to the following question:

> "Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?"

The issue that the jury decided, thus, was based on traditional fraud concepts, not on the theory that defendant claims was the basis of plaintiff's case at trial.

gal encyclopdia, it is a general rule of law in this country that:

> " 'Where misrepresentations are made to the public at large, or to a particular class of persons, with the intention of influencing any member of the public, or of the class, to whom they may be communicated, any one injured through proper reliance thereon may secure redress. In such a case it is not necessary that there should be an intent to defraud any particular person; but the representation must of course have been intended for the public, or for a particular class of persons to which the complainant belonged.' " *Coughlin v. State Bank of Portland,* 117 Or. 83, 96, 243 P. 78 (1926), *quoting* 26 CJ 1121-23, § 48bb.

In *Coughlin,* the plaintiff alleged that the defendants published misleading statements of a bank's financial condition and that the plaintiff relied on those statements in deciding to purchase stock in the bank. The Supreme Court held that the plaintiff's complaint stated a claim for fraud and entitled him to present his supporting evidence. *Id.* at 105, 243 P. 78.

In addition, under Oregon law, a defendant may make misrepresentations in many different ways.

> "To communicate a representation it is not necessary that the party should speak words, or write a message. The desired result may be accomplished ofttimes by conduct. Indeed, the tongue and the pen are only two of the numerous means of transmitting messages. * * * Indeed, the action for deceit * * * had its

> origins in false impersonation." *Pennebaker v. Kimble et al.*, 126 Or. 317, 322-23, 269 P. 981 (1928).

As examples of conduct that communicates representations, the *Pennebaker* court mentioned a buoy in a harbor warning of a shoal, a check drawn on a bank implying an amount on deposit to cover it, and Paul Revere's lanterns. It then quoted a New Jersey case, which itself quoted an encyclopedia, that held that a misrepresentation

> " ' "may consist in the creation of a false impression by words or acts, or by any trick or device, a deep laid scheme of swindling, or a direct falsehood, a combined effort of a number of associates or the sole effort of a solitary individual." ' " *Id.* at 323-24, 269 P. 981,*quoting Berkowitz v. Lyons,* 98 N.J.L. 198, 119 A. 20, 21-22 (1920), *quoting*12 RCL 232.

Thus, under Oregon law, plaintiff does not need to prove that defendant expressly directed its misrepresentations to Williams or even knew of his existence, so long as plaintiff can show that Williams was within a class of people whom defendant intended to be recipients of and to rely on the message that it conveyed. In addition, the fundamental character of fraud is the communication of a misimpression to induce another to rely on it. That is something that a defendant may do by a variety of actions as well as by specific statements. Plaintiff alleges that the message that defendant intended to convey was that there was a legitimate controversy about whether there was a connection between cigarette smoking and human health and that it intended to encourage smokers to continue to smoke and not to

make the necessary effort to stop smoking. As a smoker, Williams was an intended recipient of defendant's message.

The evidence would permit the jury to find that defendant conveyed the message that plaintiff describes over many years and in many ways, intentionally creating an impression on which it intended Williams and other smokers to rely. The length of the time over which defendant conveyed the message, and the nature of the misrepresentations on which Williams relied, make it unlikely that plaintiff could single out a specific instance from all of the representations that Williams received. Defendant's purpose was to create an impression in the public's mind – including smokers like Williams – that the health issue remained undecided.[9] In late 1953, after the early studies linking cigarette smoking with cancer and the apparently connected fall in cigarette sales, a number of tobacco companies, including defendant,[10] joined to hire a leading public relations firm to find a way to counter their effect. The first step in their subsequent campaign was the publication in January 1954 of "A Frank Statement to Ciga-

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[9] Plaintiff also presented evidence showing that advertising for Marlboros emphasized images of healthy and strong men. The apparent purpose of that evidence was to show that the advertising created an impression that contradicted the idea that smoking could cause disease. Because there is sufficient evidence of direct representations to support the jury's verdict, we do not need to consider whether defendant's advertising strategy would also be relevant for that purpose.

[10] At the time, defendant was the fifth largest tobacco company in the country. In large part due to the success of Marlboros, its market share grew over the following years until it reached its current status of having approximately half of the domestic market for cigarettes.

rette Smokers."[11] Defendant and the other leading tobacco companies, together with several associations of tobacco growers and marketers, signed the statement, which appeared in 448 newspapers. The publicity covered the great majority of the country's population. In the "Frank Statement," the signatories stated that they believed that their products were not injurious to health and announced the establishment of the Tobacco Industry Research Committee (TIRC) to conduct research into "all phases of tobacco use and health." In 1964, the TIRC was divided into the Tobacco Institute, which focussed on public relations and lobbying, and the Council on Tobacco Research (CTR), which supported scientific research.

According to plaintiff's evidence, the "Frank Statement" was the beginning of a "common front" approach among tobacco companies on the health issue, with all companies expressing essentially the same message and using the TIRC and its successors to speak for the industry as a whole. Their original position was to deny that there was a problem; thus in the 1950s and early 1960s Phillip Morris officials represented publicly that the company would "stop business tomorrow" if it thought that its products were harmful. However, as evidence of the harmful

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[11] The trial court ruled that there was no evidence that Williams relied on the "Frank Statement," and plaintiff does not challenge that ruling on appeal. The "Frank Statement" remains relevant, however, as evidence of the beginning of a campaign on which, the jury could have found, Williams did rely. The court instructed the jury that it could consider the "Frank Statement" as relevant to defendant's knowledge or state of mind.

effects of tobacco increased,[12] the industry took a different approach. Particularly after the 1964 Surgeon General's report, which emphasized the connection between smoking and lung cancer, the industry focussed on keeping the "controversy" alive and calling for "more research" for the purpose of suggesting that the health question about cigarette smoking was not yet clear. In an internal memorandum shortly after the 1964 report, a Phillip Morris vice president explained that it was necessary to "provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking." From the evidence in this case, the jury could properly infer that Williams was one of those smokers to whom defendant was referring.

Defendant and the industry continued throughout the 1970s, 1980s, and 1990s to encourage the impression that there was a genuine and continuing controversy. They did not expressly deny that cigarettes caused cancer but instead provided smokers what a Tobacco Institute memorandum described as "ready-made credible alternatives" to that conclusion by suggesting that there were other factors involved in the diseases of which smokers died and by emphasizing that there was "no proof that smoking causes cancer." The jury in this case could find from the evidence that, in making those statements, they relied on criteria for proof of causation that the scientific community generally either had never accepted or had since discarded. Although defendant and the in-

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[12] One of plaintiff's expert witnesses testified that, by the late 1950s, there could no longer be a genuine scientific question about the connection between smoking and lung cancer.

dustry[13] emphasized the need for research, and although it is inferable from the evidence that defendant and other tobacco companies conducted a great deal of research into tobacco themselves and sponsored other researchers, they consciously avoided research in the United States that might indicate the biological effects of tobacco use and thus resolve the question that, they claimed, most needed further research. In particular, defendant conducted all sensitive research in a laboratory that it purchased in Europe, taking care to avoid preserving records of the results in this country. The person who was defendant's director of research in the late 1970s and 1980s told a subordinate that one of the director's functions was to "fuel the controversy" as to whether cigarettes cause disease. The director explained that it was his job

> "to attack outside reports of links between smoking and cancer or smoking and emphysema or things of that sort by maintaining that there's a controversy and providing the information that would discredit or somehow cast [doubt] on the outside research."

Defendant and the tobacco industry promoted their message through a large number of press releases and statements and through less obvious methods, including influencing the content of apparently neutral articles and cultivating "opinion leaders" who would convey their message. They attempted to used the power of their advertising to

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[13] The Tobacco Institute, rather than defendant itself, made many of the statements on which plaintiff relies. The jury could find that in making those statements the Tobacco Institute acted on behalf of defendant and other cigarette manufacturers.

procure favorable treatment from the print media. Industry spokespersons appeared on news shows on commercial and public television to state their position on smoking and health issues. The theme of their statements was that the evidence concerning the health effects of tobacco was based primarily on statistical relationships and that there was no proof that a specific tobacco component caused a specific disease. In addition, they suggested that there could be other causes, not connected to tobacco use, for the various diseases attributed to smoking. Although by the early 1990s the industry was forced to agree that tobacco could be a risk factor associated with a number of diseases, its spokesmen still publicly asserted that there was a long chain of intervening events involved before a disease arose from cigarette smoking. Defendant also stated publicly that it did not believe that cigarette smoking was addictive.

There is evidence that Williams received the message that defendant intended to communicate and that the message affected his decision to continue smoking and not to make more serious efforts to overcome his addiction to cigarettes.[14] Williams read the *Oregonian*, other newspapers and magazines, and watched television, all of which were me-

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[14] Defendant points to the large amount of information available to Williams that emphasized the dangers of smoking to health. Plaintiff does not disagree with that point. Rather, her argument is that defendant created a controversy in order to give smokers like Williams a reason to continue smoking despite the information concerning the dangers. Plaintiff makes the argument, which the jury was entitled to believe from the evidence, that defendant knew that smoking was harmful to health but instead misrepresented that fact to the public for its own economic gain.

dia through which defendant conveyed its message. The evidence includes examples of newspaper stories describing the dangers of tobacco that also contain statements from industry spokespersons insisting that the dangers were not proved and at times attacking the validity of the research suggesting harmful effects. Industry newspaper advertisements conveyed the same message. For instance, in an article published in the *Oregonian* in 1991, an industry spokesman said that the dangers were not proven and argued that the money that the CTR spent on research showed how open-minded the industry was.

Williams' own statements show that he received and relied on defendant's misrepresentations. When Williams' family urged him to stop smoking, he responded that what he had seen on television demonstrated that smoking did not cause cancer. When his son gave him articles on the subject, he responded by finding his own articles that countered the dangers of smoking. After his diagnosis, he told his wife that the "cigarette people" had deceived him, that he had been betrayed, and that "they were lying all of the time." The jury could find from the evidence that no one other than defendant and the rest of the tobacco industry promoted the message to which Williams referred. Because of his exclusive use of Phillip Morris products, the jury could also conclude that he meant defendant when he referred to the "cigarette people."[15] Thus, the evidence supports a reasonable

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[15] Defendant argues that the only message that it is certain that Williams received was the health warning on each pack of cigarettes. There is evidence that Williams handled the packs in such a way that he seldom saw the warning. More significantly, when his wife drew his attention to the warning, Williams responded, "This is what the Surgeon General says, it's

inference that Williams purchased cigarettes after September 1, 1988, in reliance on defendant's previous and continuing representations and that those cigarettes were a substantial factor in causing his lung cancer. Consequently, the trial court did not err in denying the motion for a directed verdict on the fraud claim.

Defendant raises no issues concerning the amount of compensatory damages awarded to plaintiff on the fraud claim. Because the award of compensatory damages on the fraud claim is greater than the award of compensatory damages on the negligence claim due to the effect of the comparative negligence verdict, we need not consider defendant's assignments of error concerning the negligence claim. The trial court properly entered judgment for plaintiff for compensatory damages on the fraud claim.

We turn to the issue of punitive damages. We first consider the requirements for an award of punitive damages and the standard by which we review a jury's decision to make such an award. ORS 18.537(1) and ORS 30.925(2) establish the criteria for the jury to apply in deciding whether to award punitive damages and in determining their amount. ORS 18.537(1) provides that, in order to recover punitive damages, the plaintiff must prove by clear and convincing evidence

> "that the party against whom punitive damages are sought has acted with malice or has

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not what [the] tobacco company says." The existence of the warning was only one factor for the jury to consider in determining whether Williams reasonably relied on defendant's representations.

> shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others."

ORS 30.925(2) establishes more specific criteria for awarding punitive damages in a product liability civil action: "Punitive damages, if any, shall be determined and awarded based upon the following criteria:

> "(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
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> "(b) The degree of the defendant's awareness of that likelihood;
>
> "(c) The profitability of the defendant's misconduct;
>
> "(d) The duration of the misconduct and any concealment of it;
>
> "(e) The attitude and conduct of the defendant upon discovery of the misconduct;
>
> "(f) The financial condition of the defendant; and
>
> "(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected."

If a jury awards punitive damages, both the trial and appellate courts review the amount of the award to determine whether it meets the statutory and con-

stitutional standards. The legislature has codified the Supreme Court's statement of the nature of that review:

> "If an award of punitive damages is made by a jury, the court shall review the award to determine whether the award is within the range of damages that a rational juror would be entitled to award based on the record as a whole, viewing the statutory and common-law factors that allow an award of punitive damages for the specific type of claim at issue in the proceeding." ORS 18.537(2); *see Parrott v. Carr Chevrolet, Inc.*, 331 Or. 537, 551 n. 10, 17 P.3d 473 (2001) (stating that ORS 18.537(2) codifies the standard established in *Oberg v. Honda Motor Co.*, 320 Or. 544, 888 P.2d 8, *cert. den.* 517 U.S. 1219, 116 S.Ct. 1847, 134 L.Ed.2d 948 (1996)).

The heart of the standard for reviewing awards of punitive damages, thus, is determining whether the award is one that a rational juror could make in light of the record as a whole and the legal factors that justify an award of punitive damages on the specific type of claim. In *Parrott*, the Oregon Supreme Court recently held that the rational juror standard is consistent with the federal Due Process standard discussed in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). The Court said that the *Gore* guideposts, together with the Oregon statutory standard, establish five criteria that a court should consider in determin-

ing the range that a rational juror would be entitled to award:[16]

> "(1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue * * *; (2) the state interests that a punitive damages award is designed to serve * * *; (3) the degree of reprehensibility of the defendant's conduct * * *; (4) the disparity between the punitive damages award and the actual or potential harm inflicted * * *; and (5) the civil and criminal sanctions provided for comparable misconduct [.]" *Parrott,* 331 Or. at 555, 17 P.3d 473.

Defendant argues that *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), undercuts the continuing vitality of *Parrott.* In *Cooper Industries,* the United States Supreme Court held that an appellate court must review a trial court's decision on whether an award of punitive damages is excessive as a matter of law rather than for an abuse of discretion.[17] In

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[16] The trial court held that the jury's award of punitive damages was proper under the Oregon statute, but it reduced the award on the ground that it was excessive under the federal constitution. It reached that conclusion before the decision in *Parrott* and thus did not have the benefit of the Supreme Court's analysis in that case.

[17] The phrase that the *Cooper Industries* Court used was "*de novo*" review. As we have previously noted in discussing *Cooper Industries,* that is not a phrase that Oregon courts apply to the review of legal holdings; it is properly limited to the review of factual findings. *See Bocci v. Key Pharmaceuticals, Inc.,* 178 Or.App. 42, 50 n. 2, 35 P.3d 1106 (2001), *rev. pending* (2002); *Waddill v. Anchor Hocking, Inc.,* 175 Or.App. 294, 302 n. 5, 27 P.3d 1092 (2001), *rev. pending.*

reaching that conclusion, the Court stated that the amount of a punitive damages award is not a finding of fact that implicates the Seventh Amendment's limitations on judicial review of jury awards. Defendant argues that that holding in *Cooper Industries* weakens the premise of *Parrott,* which defendant identifies as treating the review of a punitive damages award as the review of a factual determination by a jury. Rather, according to defendant, it is now clear that the imposition of punitive damages is not based on findings of fact but on the application of a constitutional standard to the facts of a case. Thus, according to defendant, the rational juror standard of *Parrott* does not satisfy constitutional requirements.

We disagree with defendant's understanding of *Cooper Industries.* The background for that case was the Court's long-established rule that the Seventh Amendment forbids appellate review of federal district court refusals to set aside jury awards of compensatory damages on the ground that they are excessive. The Court modified that rule several years before *Cooper Industries* to allow federal appellate courts to review district court determinations for abuse of discretion, at least in diversity cases when the substantive state law provided for that kind of appellate review. *Gasperini v. Center for Humanities, Inc.,* 518 U.S. 415, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996).

In *Cooper Industries* the Court held that a jury's determination of the *amount* of punitive damages was not a "fact" within the *Gasperini* rule and thus was subject to a broader scope of appellate review than it had established in that case. *See*532 U.S. at 437-40 and n. 11, 121 S.Ct. 1678. However, it also recognized that determining the amount of punitive

damages is a "fact-sensitive undertaking" that is appropriately left to the discretion of the jury. *Id.* at 437-38 n. 11, 121 S.Ct. 1678. The Court noted in *Cooper Industries* that the district court had instructed the jury concerning the factors for it to consider in awarding punitive damages. It then stated that, "[a]lthough the jury's application of these instructions may have depended on specific findings of fact, nothing in our decision today suggests that the Seventh Amendment would permit a court, in reviewing a punitive damages award, to disregard such jury findings." *Id.* at 439 n. 12, 121 S.Ct. 1678. Finally, the Court reaffirmed that the *Gore* criteria are the appropriate criteria for reviewing an award of punitive damages for excessiveness. *Id.* at 440, 121 S.Ct. 1678.

The Court in *Cooper Industries,* thus, recognized the jury's primary role in finding the facts relevant to an award of punitive damages, in determining whether to make such an award, and in establishing the appropriate amount. *Cooper Industries,* in our view, does not alter the criteria by which a trial court is to review that award and, thus, does not affect the Oregon Supreme Court's discussion of those criteria in *Parrott.* Rather, what *Cooper Industries* does is to require an appellate court to review the trial court's decision on the amount of punitive damages as a matter of law-that is, by plenary review – rather than for an abuse of discretion. *See also Bocci v. Key Pharmaceuticals, Inc.,* 178 Or.App. 42, 50-51, 35 P.3d 1106 (2001), *rev. pending* (2002). That is consistent with the way that we have always reviewed trial court decisions regarding punitive damages. *See, e.g., MacCrone v. Edwards Center, Inc.,* 160 Or.App. 91, 106, 980 P.2d 1156 (1999), *vacated and remanded,* 332 Or. 41, 22 P.3d 758, *adhered to on remand,* 176

Or.App. 355, 31 P.3d 513 (2001), *rev. den.*, 334 Or. 190 (2002); *Blume v. Fred Meyer, Inc.*, 155 Or.App. 102, 114, 963 P.2d 700 (1998). We therefore follow the *Parrott* criteria, including the reasonable juror standard, in reviewing the jury's award against defendant, and we give no deference to the trial court's decision on the issue.

We first consider defendant's two assignments of error concerning the jury instructions on punitive damages. Defendant assigns error to the trial court's failure to instruct the jury that its award should bear a reasonable relationship to the harm caused to Williams. However, the proposed instruction would also have told the jury not to punish defendant for alleged misconduct towards other persons who might bring their own cases and receive their own punitive damages awards. In *Parrott*, the Supreme Court made it clear that the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages. 331 Or. at 563, 17 P.3d 473. The proposed instruction's speculative reference to unknown other lawsuits by unknown other plaintiffs was contrary to that principle. It was also inconsistent with ORS 30.925(2)(g), which allows the jury to consider other punishments already imposed on the defendant. Because the proposed instruction was incorrect in that respect, we do not need to consider whether the rest of it was correct. The trial court properly rejected it. *See Simpson v. Sisters of Charity*, 284 Or. 547, 560, 588 P.2d 4 (1978) (trial court not required to give instruction that contains, in part, erroneous language).

Defendant also assigns error to the trial court's instruction that the maximum amount that the jury

could award was $100 million. It argues that that instruction told the jury that it could award an amount that would have been far greater than what was constitutionally permissible. Plaintiff's complaint prayed for $100 million in punitive damages. The trial court in its instruction merely told the jury what plaintiff sought. Defendant did not move to reduce the amount of the prayer on the ground that it was greater than the evidence would support or that it sought an impermissible amount. In addition, telling the jury the upper limit that the pleadings establish for its verdict is consistent with ordinary Oregon trial practice. *See Wiebe v. Seely Administrator,* 215 Or. 331, 357, 335 P.2d 379 (1959).

We now evaluate the jury's award for excessiveness under the previously stated criteria. We begin by stating the relevant evidence that we have not previously described, again stating it in the light most favorable to plaintiff. *Parrott,* 331 Or. at 556, 17 P.3d 473. In addition to the evidence that defendant intentionally made false representations to Williams and that he relied on them to his detriment, plaintiff points to five categories of evidence to support the jury's award of punitive damages in the amount of $79.5 million.[18] First, there is evidence that defendant knew that smoking caused lung can-

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[18] Defendant asserts that, because the jury declined to award punitive damages on the negligence claim, it could consider only evidence relevant to the fraud claim in determining whether to award punitive damages and in determining their amount. The evidence that defendant seeks to exclude from our review of the jury's decision relates to the consequences of defendant's fraudulent conduct, which is certainly relevant to an award of punitive damages. The evidence was admitted without limitation, and the jury was entitled to consider it.

cer and other diseases at the same time that it publicly claimed that the issue was unresolved. As early as 1958, three British scientists, meeting with scientists and tobacco executives, reported that industry representatives believed that smoking could lead to lung cancer. In 1961, defendant's director of research stated internally that "carcinogens are found in practically every class of compounds in smoke" and that the best that the company could hope to do was to reduce their amounts. Later, defendant's internal memoranda made similar points, in some instances suggesting that the company could not admit the facts publicly because of the probable adverse legal consequences.

Second, defendant recognized that nicotine was both addictive and the primary reason why people continued smoking. The strongest statement of this fact may have been a presentation by a Phillip Morris scientist in 1972. In that presentation, he stated that the "cigarette should be conceived not as a product but as a package. The product is nicotine[.]" He continued, "[t]hink of the cigarette pack as a storage container for a day's supply of nicotine," and "[t]hink of the cigarette as a dispenser for a dose of nicotine." Defendant spent considerable effort in the following years studying the best way to deliver the optimal dose of nicotine in each cigarette and to increase the effectiveness of the nicotine, resulting in the discovery of a number of ways of manipulating the material in cigarettes for that purpose without actually adding nicotine to it.

Also, defendant carefully evaluated smoking cessation programs and technologies, concluding that alternative sources of nicotine, such as patches or gum, were ineffective in the absence of ongoing be-

havioral therapy. Because that therapy was expensive and time consuming, defendant thought it unlikely that it would have a serious effect on the number of smokers. Defendant's public relations program of creating a controversy that would give smokers a "crutch," a reason to believe that there were serious doubts that tobacco was harmful, thus, would discourage them from making the significant effort that was necessary to stop smoking. The "controversy" created by the tobacco industry was defendant's method of counteracting the information that otherwise suggested the harmfulness of cigarettes. Such an approach was aimed particularly at highly addicted smokers like Williams, who would search for any justification to continue smoking.

Third, defendant conducted research in such a way as to avoid studying the health effects of smoking, all the while asserting publicly that there was need for further research on that very issue. It used the CTR's research as a shield and as a source for expert witnesses at congressional hearings and in lawsuits against it rather than for research into the relationship between smoking and disease. The jury could have found on the record in this case that defendant specifically avoided testing with live animals and testing actual production cigarettes. On one occasion when defendant did test production cigarettes, the results were unfavorable, and it destroyed them. It is inferable from the record that tobacco industry lawyers, rather than scientists, set the general direction of the CTR's research program and that they did so for the purpose of protecting the industry's litigation position rather than to resolve scientific questions.

Also, the jury could have found that the tobacco industry had a "gentleman's agreement" not to conduct research beyond the scope of the CTR's efforts. Thus, to the degree that defendant conducted animal testing that was relevant to the relationship between cigarette smoking and human disease, it did so in a European laboratory and took precautions to ensure that the results of that research did not appear in its American records.

Fourth, defendant's actions caused harm to many others in Oregon besides Williams. Although a tobacco industry survey indicated that 85 percent of smokers wished that they had never started smoking, defendant concealed information that the addictive effects of nicotine made it difficult for them to stop without significant assistance. The fraudulent statements from defendant and the rest of the industry reinforced those addictive effects by giving smokers a reason not to make the necessary effort to break the addiction. The jury could find on this record that defendant's public relations campaign had precisely the effect that defendant intended it to have and that it affected large numbers of tobacco consumers in Oregon other than Williams. It is also reasonably inferable from the evidence that defendant's products, used as defendant intended them to be used, caused a significant number of deaths each year in Oregon during the pertinent time period, together with other serious but nonfatal health problems with their attendant economic consequences.

Finally, cigarettes are relatively inexpensive to produce, and they provide a large profit margin. By maintaining a large population of smokers through fraudulent representations, defendant protected those profits. At the time of trial, defendant's net

worth was over $17 billion. Its profit from cigarette sales in 1996, the year that Williams was diagnosed with lung cancer, was over $2 billion. In 1997, the year that Williams died and the most recent year for which figures were available at the time of trial, defendant's profit was $1.6 billion.

In light of the above evidence, we turn to the applicable criteria for an award of punitive damages.[19] First, the jury could find that there was a strong likelihood at the time of defendant's fraudulent statements that serious harm would arise from them. ORS 30.925(2)(a). Even at the beginning of defendant's public relations scheme, it was generally recognized that cigarette smoking had probable serious health consequences. Viewing the evidence most favorably to plaintiff, there was little doubt about the relationship between smoking and lung cancer by the late 1950s, and there was absolutely no basis for a genuine dispute on the issue by the 1970s and 1980s. Throughout that period, defendant continued its public relations campaign asserting that smoking had not been proven to be harmful and that more research was necessary. Its campaign was intended to give smokers a crutch to justify their continued smoking, and the jury could reasonably conclude that the message that defendant disseminated would put

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[19] The legislature first adopted those criteria for awarding punitive damages in 1979, Or. Laws 1979, ch. 866, § 3, although at least some of them reflect previous case law. Defendant thus was on notice of the possibility of a punitive damages award under Oregon law for its conduct 17 years before Williams was diagnosed with lung cancer and 9 years before September 1, 1988, the beginning of the period during which plaintiff had to prove that cigarette smoking was a substantial factor in causing Williams' death.

all of those who relied on it at risk and would cause serious harm to many of them.

Second, the jury could find that, by 1958, defendant was aware of the likelihood of the harm that its actions would cause and that it was certainly aware of that harm by the 1970s. ORS 30.925(2)(b). Third, defendant's misconduct was highly profitable, producing billions of dollars of profit over many years. There is evidence that defendant believed, in fact, that its misrepresentation of the dangers of smoking was important to its ability to continue in the cigarette business. ORS 30.925(2)(c). Fourth, defendant's misconduct lasted over four decades, and defendant concealed it as long as it could. The extent of defendant's actions did not become clear until judicially-required releases of documents occurred in the 1990s. ORS 30.925(2)(d). Fifth, there is no evidence that defendant showed any regret or changed its conduct upon the discovery of its actions. ORS 30.925(2)(e). Sixth, defendant is a wealthy corporation, and a small award of punitive damages would have little effect on it. ORS 30.925(2)(f). Finally, there is no evidence in the record of other punishment (including other punitive damages awards) inflicted upon defendant as a result of its misconduct. ORS 30.925(2)(g).

We turn next to the criteria that the United States Supreme Court identified in *Gore* and that the Oregon Supreme Court adopted in *Parrott*. The first *Gore* criterion concerns the state interests that an award of punitive damages is designed to serve. Those interests involve the health and lives of the state's citizens and residents. It is difficult to perceive how the state could have any greater interest than the preservation of the health and the lives of

the citizens who make up the state. In *Waddill v. Anchor Hocking, Inc.*, 175 Or.App. 294, 27 P.3d 1092 (2001), *rev. pending* (2002), we held that there is a state interest in preventing injury to Oregon consumers from defective products and in punishing manufacturers who fail to investigate the safety of their products. 175 Or.App. at 306, 27 P.3d 1092. Here, the jury could find that defendant did not simply fail to investigate the safety of its products; it knew that they were unsafe and entered on a course of fraudulent conduct designed to encourage Oregon smokers to continue using those products despite the danger to their health.

The second *Gore* criterion concerns the reprehensibility of the defendant's actions. The jury could find from the evidence that defendant sought to make large amounts of money by engaging for more than four decades in a fraudulent scheme to induce people to use or continue to use a product that could cause serious illness or death to a significant percentage of those who used it as intended. Because defendant's product affected the lives and the health of consumers as well as the economic interests of both consumers and nonconsumers, and because it occurred over an extended period, that conduct is far more reprehensible than the unlawful methods of selling used automobiles by the defendant that the *Parrott* court considered. In light of the Supreme Court's decision in that case, the comparative harm in this case strongly suggests an award of punitive damages.

The third *Gore* factor is the disparity between the punitive damages award and the actual or potential harm inflicted. Defendant argues that the primary issue in evaluating this factor is the ratio between plaintiff's compensatory damages and the pu-

nitive damages award. It notes that the jury's verdict would produce a ratio of 97 to 1, while the ratio after the court's remittitur is 39 to 1. It discusses a number of other cases in which the ratios between the plaintiff's injuries and the punitive damages award were considerably less and refers to several United States Supreme Court cases that appeared to give the ratio significant weight in determining whether an award was excessive. The difficulty with this approach is that, as the Oregon Supreme Court pointed out in *Parrott,* the federal court's treatment of the subject demonstrates that "no 'simple mathematical formula' controls our review of the ratio of punitive damages to actual and potential harm." 331 Or. at 563, 17 P.3d 473. That is not surprising, because it is inherently impossible to capture all of the qualitative factors that go into determining the appropriate level of punishment in one simple ratio.

In *Parrott,* the Supreme Court affirmed a verdict in a case of consumer fraud in which the ratio between punitive and compensatory damages was 87 to 1. In doing so, it explained:

> "Because defendant's tortious conduct was a routine part of its business practice that it was unwilling to change, we also consider the potential injury that its misconduct may have caused to past, present, and future customers. Additionally, although the actual economic harm that plaintiff suffered in this proceeding was relatively small, that harm was the result of defendant's 'particularly egregious' acts." 331 Or. at 563, 17 P.3d 473.

In this case, defendant's actions were part of its business strategy for over 40 years and, in defendant's own assessment, significantly contributed to

its profitability. It is thus appropriate to consider the effects of defendant's actions on persons other than Williams in determining the amount of punitive damages. As we have already discussed, defendant's actions, even more than those of the defendant in *Parrott,* were "particularly egregious" and thus justify particularly strong judicial punishment. *See Lane County v. Wood,* 298 Or. 191, 203, 691 P.2d 473 (1984) (purpose of punitive damages is "not to compensate an injured party, but to give bad actors a legal spanking"). In light of the 87 to 1 ratio in *Parrott,* we see nothing in a ratio of 97 to 1 that raises our judicial eyebrows, given the egregious nature of defendant's conduct as implicitly determined by the jury.

Beyond that, defendant's narrow focus on the ratio between punitive and compensatory damages ignores the underlying purpose for awarding punitive damages, which is to punish and deter a wrongdoer. The reprehensibility of the defendant's actions, the number of people affected or potentially affected, and indications that the defendant will not change its actions without punishment are all relevant factors. It is also clear that the defendant's wealth is an important consideration; an award that might be a serious punishment for one defendant could be only a minor inconvenience for another. *See Hicks v. Lilly Enterprises,* 45 Or.App. 211, 217, 608 P.2d 186 (1980). Oregon law has recognized that principle for over 60 years. *See State ex rel Thesman v. Dooley,* 270 Or. 37, 42, 526 P.2d 563 (1974); *Lamb v. Woodry,* 154 Or. 30, 47, 58 P.2d 1257 (1936); *see also Restatement (Second) of Torts,* § 908 and comment c (1979). In this case, defendant's net worth is over $17 billion, and its profits for the year closest to the trial were over $1.6 billion, or approximately $30.7 million per week.

The jury's award of $79.5 million, thus, is equal to a little more than two and a half weeks' profit.

Thus, there are at least two factors for determining the disparity between the punitive damages award and the actual harm inflicted in addition to the ratio to which defendant gives so much attention. First, when the defendant's conduct involves a course of conduct that has affected people other than the plaintiff, the jury may properly consider the effect of that conduct on those other people. Although defendant is legitimately concerned that there may be future punitive damages awards that, combined with the one in this case, would be excessive in total, ORS 30.925(2)(g) provides the appropriate method of avoiding that result. By requiring the jury and court to consider the total deterrent effect of other punishment imposed on defendant, including other punitive damages awards, it will permit future juries and courts to take previous awards into account when they set or evaluate punitive damage awards in future cases. The alternative to that approach is to limit punitive damages in this case to an amount that may be inadequate, based on speculation of what might happen in some unknown future case.

The second additional factor is that there is more to the issue of proportionality than the dollar amounts involved. First, when the record contains evidence of the defendant's financial condition, determining the proper relationship between the punitive award and the actual harm may well include consideration of that evidence. The same dollar amount will have a very different effect, for example, on a small, struggling business from what it will have on a large, profitable one. Second, some kinds of harm cannot be fully captured in money value. In

this case, for example, the jury could have found that defendant's actions resulted in Williams' death; based on that finding, it could have believed, in light of defendant's profits, that only a large award would be proportionate to the harm that defendant caused.[20]

The final *Gore* criterion concerns the civil and criminal penalties that could be imposed for comparable misconduct. The court in *Parrott* appears to have treated this factor as primarily related to fair notice to the defendant of the extent of punishment that the state might impose for its actions. 331 Or. at 563-64, 17 P.3d 473. Oregon law does not provide administrative or other civil sanctions for defendant's actions. Plaintiff argues, however, that first-degree manslaughter, ORS 163.118(1)(a), and second-degree manslaughter, ORS 163.125(1)(a), which impose penalties for reckless homicide, are relevant to this factor. The problem, as defendant points out, is that it is difficult to compare the criminal sentences available under the manslaughter statutes with the economic sanction of punitive damages, particularly when the defendant is a corporation. We do

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[20] Defendant also suggests that it is being punished for its participation in a public debate concerning a matter of general importance and that that punishment violates Article I, section 8, of the Oregon Constitution. Defendant ignores that the jury could have found that, rather than engaging in a public debate, defendant made representations concerning the relationship between smoking and human health either without believing them to be true or in reckless disregard of their truth or falsity and that it did so to induce people like Williams to continue using its products. That kind of fraud is not something that the Oregon Constitution protects. *See Smallwood v. Fisk*, 146 Or.App. 695, 934 P.2d 557 (1997) (punitive damages for fraud are a historical exception to Article I, section 8).

not believe that this factor plays a major role one way or the other. To the extent that the issue involves adequate notice to defendant, the established Oregon law of punitive damages, including ORS 30.925(2), was sufficient to alert defendant to the possible punishment for its fraudulent scheme. After consideration of all of the above factors, we conclude that the jury's award was not excessive under the criteria identified in *Parrott* and *Gore*, and the trial court therefore erred in reducing it.

Finally, defendant argues that the trial court erred in refusing to exercise its discretion under ORS 18.537(3) to reduce the jury's award to reflect a settlement that it and other cigarette manufacturers had reached with 46 states. That statute authorizes a court to reduce an award if the defendant establishes that it has taken reasonable remedial measures to prevent recurrence of the conduct that gave rise to the punitive damages award. Defendant argues that the settlement with the state qualifies under the statutory criteria. The trial court denied the motion on the ground that the settlement did not constitute an unequivocal acceptance of responsibility, which it believed was necessary to meet the criteria for a reduction in the jury's award under the statute. Plaintiff also argues that, to the extent that the statute permits a court to reduce a jury's award based on evidence that was not before the jury, the statute violates Article VII (Amended), section 3, of the Oregon Constitution.

We do not need to decide whether either defendant or plaintiff correctly understands the import of the statute. The factual foundation of defendant's ar-

gument is the Consent Decree and Final Judgment [21] that resolved the litigation between defendant and the State of Oregon. Section VI(G) of that judgment provides, in part:

> "*Neither this Consent Decree and Final Judgment nor any public discussions, public statements or public comments* with respect to this Consent Decree and Final Judgment by the State of Oregon or any Participating Manufacturer or its agents *shall be offered or received in evidence in any action or proceeding for any purpose* other than in an action or proceeding arising under or relating to this Consent Decree and Final Judgment." (Emphasis added.)

The trial court could not use the settlement as a basis for reducing the jury's verdict without the consent judgment somehow being in evidence. By its own terms, which reflect defendant's agreement with the state and the other parties to the litigation that led to the judgment, the settlement was not admissible for the purpose for which defendant seeks to use it in this case. The trial court did not err.

We do not discuss the remaining arguments of the parties because there would be no benefit to the bench or bar from our doing so.

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[21] Despite its caption, the document at issue is simply a judgment. Since the effective date of the Oregon Rules of Civil Procedure, "judgment" has been the sole correct term for the final determination of the rights of the parties in a civil action. "Decree," which formerly referred to the final determination of the rights of the parties in a suit in equity, is no longer appropriate. *See* ORCP 2; ORCP 67 A; *Webber v. Olsen*, 330 Or. 189, 192 n. 1, 998 P.2d 666 (2000).

On appeal, reversed and remanded with instructions to enter judgment on jury verdict; affirmed on cross-appeal.

APPENDIX E

[Trial Tr. Vol. 22-C] [Ruling on Defendant's Proposed Jury Instructions and Excerpts of Oral Argument on Jury Instructions in the Circuit Court of the State of Oregon, for the County of Multnomah (Mar. 23, 1999)]

* * *

[Tr. 58] THE COURT: I don't think that's an amount statement.

MR. BEATTIE: I'm not expressing myself very well, Your Honor. I apologize. Let me back up and say if there is a difference between the two, I don't think it is significant, and I would go with the statement in

THE COURT: Okay. Continuing down plaintiff's first -- I would like to go all the way through plaintiffs and then go through defendant's and see what you are offering that isn't here.

MR. BEATTIE: Okay.

THE COURT: Plaintiff's No. 34 then proceeds to set forth the standards by which the jury should determine and assess. Are these the six that are straight out of the statute?

MR. COON: Right. We have omitted the 7th. I think this is intended to be just the statutory language.

THE COURT: Let me look at the statute.

MR. COON: 39.025.

THE COURT: Mr. Beattie, I'm going to read from the statute. If you would like to

* * *

[Tr. 68] consider the harm caused elsewhere?

Mr. COON: The Oregon statute says you can consider the likelihood that serious harm would arise, profitability, degree of the awareness, duration of misconduct.

It is just not the duration of the misconduct that caused harm to Jesse Williams. It is the duration of the misconduct that caused harm to other people. We should be clear, there is harm to other folks, and then there is harm to other folks outside Oregon.

I don't think maybe the defendants are arguing harm to other people in Oregon, I think they are arguing about what might have happened to people outside of Oregon.

THE COURT: What part of your 34, Mr. Beattie, is directed to this Gore v. BMW?

MR. BEATTIE: Much of it, Your Honor.

THE COURT: Tell me where to look.

MR. BEATTIE: This one aspect is addressed on Page 3 at Lines 1 through 6, carrying over from Page 2. But most importantly at 5 and 6 where I have alternative highlighted, "You are not to punish the defendant for the impact of its conduct on individuals in other [Tr. 69] states" and that works into reviewing plaintiff's requested jury instructions states the statutory standards.

On No. 1, "The Likelihood" -- and I'm reading from the bottom of Instruction No. 34 on the first page. "The likelihood at the time that serious harm would arise from Defendant's misconduct." For it to meet the constitutional requirements, it should say,

"The likelihood at the time the serious harm would arise in this state for defendant's misconduct."

On 3, "The profitability of defendant's misconduct in this state." Both of those, 1 and 3, have to be state-specific under BMW v. Gore. Otherwise, you would be punishing them for harms to other people outside of Oregon that may not be punishable in those states.

THE COURT: Okay. So you are suggesting that Elements 1 and 3 need the modifier "in this state." What else needs to be done to the statutory elements under your version of the constitutional requirements?

MR. BEATTIE: I think that the elements also have to have something in them that instructs the jury that there should be a [Tr. 70] reasonable relationship between the harm caused to Jesse Williams, the amount awarded plaintiff, and the amount of punitive damages. This is at the bottom of Page 2.

THE COURT: What's the origin of that argument in terms of authority?

MR. BEATTIE: This is another Gore v. BMW. And I have to confess this is generally addressed post-judgment -- post-verdict, at least, in determining whether the amount of punitive damages is constitutionally excessive.

But the cases also state that the same factors that the Court considers in determining whether punitive damages award is constitutionally excessive are or can be the same factors considered by the jury in calculating the award in the first place.

THE COURT: Maybe I'm being too pragmatic here, but don't we have punitive damage instructions that have survived scrutiny post-whatever --

MR. COON: Post-Oberg, we have.

THE COURT: -- in Oregon, that would give me some assurance that I'm not just following a statute blindly, but meeting the constitutional [Tr. 71] issues that have been addressed and resolved by our appellate courts?

MR. COON: We don't have -- Gore is a '96 case and --

THE COURT: Gore is from Alabama, U.S. Supreme Court, constitutionality issues. I was hoping we could start first by addressing our Oregon Constitution. What we have got here is that our appellate courts have already said is okay before we --

MR. COON: This is an issue, as the Court probably knows, through Oberg, it is something that Oregon courts have done with their own statute, which was then amended in 1995. And it turns out not to be an Oregon constitutional thing, because there is no due process clause in the Oregon Constitution.

THE COURT: And you had to come here, Mr. Randles.

MR. COON: Without due process. It gets right to the Supreme Court.

THE COURT: Never mind.

MR. COON: One thing that Jay says is important. Many things are important, but one I noticed was that this -- these factors, these [Tr. 72] four factors are ones that the Court in Gore apparently, and

according to Parrott v. Carr Chevrolet, the Court of Appeals applied post-judgment, or maybe the trial Court applies post-verdict.

So this question of proportionality -- one of the other factors is what are the other penalties out there and how does this stack up for any criminal penalties for this conduct that might exist, a factor that I'm not sure that anyone can coherently argue is good grist for jury instruction. That's one of the three Gore factors. One is proportionality, how big is this compared to damages, and one is reprehensibility to the conduct.

THE COURT: Let me stop first and go back to the proportionality point you're making. Is there case law that says that the trial Court shall, in order to have a constitutional instruction, tell the jury about proportionality?

MR. BEATTIE: It has always been addressed post-verdict.

THE COURT: That's where I'm going to address it then. Unless you can show me that [Tr. 73] there is authority that I have to do it for the jury, why wander where no judge has been told to go before?

MR. BEATTIE: I think it is an accurate statement of the law and in the instruction. I certainly understand your view.

THE COURT: I am just trying to be safe. If there is no case law that says I need to do it to be constitutional, and if there is a punitive award, it is a standard I have to evaluate with guidance and briefing from both sides, obviously, I will do that. Unless it is required for the jury, they have got plenty to consider.

So that would be your Element 1 on page 2, Mr. Beattie; is that right?

MR. BEATTIE: That has to do with proportionality. It also has a second prong. It says, "You may consider the extent of harm suffered by others in determining what the reasonable relationship is. You are not to punish the defendant for the impact of its alleged misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claims and award [Tr. 74] punitive damages for those harms."

This is sort of a State ex rel Crookham sort of rush-to-the-courthouse issue where the defendant is simply trying to make sure, on one hand, that the first person in line doesn't get all of the damages to the exclusion of everybody else. But then, on the other hand, wants to make sure that the defendant is not being punished in this case for alleged harms that other persons can recover for in their own right.

So to the extent in this case they are claiming we should be punished because other persons have been harmed, and you should take into consideration those particular harms, that's not for the jury to consider because those persons themselves can recover.

THE COURT: But the goal of punitive damages is punishment and deterrence in the future; punishment for past misconduct of the defendant and deterring conduct that will hurt those other potential litigants in the future, too, so it is not necessarily resolvable that way.

MR. COON: I guess the way I would [Tr. 75] respond to that, the seven factors in the statute the Legislature had said, "These are the factors, and No. 7 is how much you have paid other people."

So what the Legislature has said is we should look back and see, had this defendant been tagged by other juries for other punitive damage amounts? But it does not say other amounts that might be awarded in the future. And the Legislature --

THE COURT: Well, I know that statute doesn't say that. What I am trying to give due consideration to is whether there is a constitutional standard that I'm obliged to invoke here for the jury's consideration in terms of what they are considering.

It seems to me that, first of all, our Legislature has considered total deterring effect and other punishments. And where there is evidence about that, obviously the jury needs to be instructed on.

In this case, unlike -- for example, like the Purcell case, we did have a defendant which had been the subject of other punitive damage awards and chose to litigate that, brought in [Tr. 76] evidence that we had been punished enough and argued to the jury we have been punished enough, and the result was what the result was, and maybe that helped. We don't know, in the end, whether that made the jury go up or down.

But in terms of instructing the jury that when they punish, they shouldn't be compensating for other claimants who haven't yet come to court, to me, that is addressed in part because we are first — we have already told the jury that punitive damages are not compensatory damages.

I would maybe say -- instead of saying "intended to compensate plaintiff," I might say "compensatory damages." They are not compensatory. They are punitive. They are designed to punish and deter and, therefore, they are not designed to compensate

for other plaintiffs who aren't here, and they are not designed to compensate this plaintiff. They are designed to punish and deter..

So I guess what I'm saying, this seems repetitive to me in that regard, the second half of your Item 1 at the bottom of page 2.

MR. BEATTIE: Well, it really isn't. [Tr. 77] What we're saying in that paragraph, you shouldn't punish us for harms to other persons who can bring their own claims for punitive damages and not compensatory damages per se.

So in calculating the amount of punitive damages under the statute -- and let me be candid at this point here. I understand that you are bound by the statute at this point. I suppose you could declare the statute unconstitutional at some level, but under the Oregon statute that is in the proposed jury instruction the plaintiff has proffered, this element is not there.

THE COURT: Is there case law that says this element has to be there for the jury?

MR. BEATTIE: Not directly, no. It is another one of the considerations that the Court looked at in the BMW case and a number of others.

THE COURT: I think the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one -- if you want to maybe introduce "compensate plaintiff or anyone else for damages caused by defendant's conduct," [Tr. 78] if that gets you where you need to be. They are designed to punish and deter.

MR. BEATTIE: Okay.

THE COURT: Do you want to introduce the phrase "or anyone else," -- "compensate plaintiff or anyone else," or are you satisfied with "plaintiff" alone there?

MR. BEATTIE: I would go with the phrase "or anyone else."

THE COURT: Is there error with that?

MR. COON: No error.

THE COURT: So I think I have satisfactorily worked my way through your Element No.1. What other parts of your instruction --

MR. BEATTIE: I'm sorry to keep going backwards.

THE COURT: Hold on. Mr. Randles wants to jump in.

MR. RANDLES: Did we resolve the other states question?

THE COURT: No, we haven't. I have written it in parenthesis yet. I am trying to work myself through all the other pieces and see what is missing and what I am obliged to give

* * *

[Tr. 86] lawyers use the word "illicit" in the jury's presence, but these concepts can be argued. I decline to give the rest of your No. 34.

MR. BEATTIE: Thank you, Your Honor. I can work out with Mr. Coon basically a modification of his,

THE COURT: Let me review what I have now for plaintiff's 34, and what I would like to see redrafted, just to summarize.

In Paragraph 1, three claims is reduced to two.

In Paragraph 2, the defendant's causation element needs to be worked in.

Then we move up as a new Paragraph 3, the two lines, "If you decide that the defendant has acted," and we insert in that "discretion to assess or not to assess."

Then we go to "Punitive damages are assessed against a defendant to punish misconduct and deter misconduct." And then we have added to the next sentence the phrase "or anyone else" after the word "plaintiff." We have stricken the rest of that paragraph.

And then the next section reads, "The amount of punitive damages, if any, shall be [Tr. 87] determined and based upon the following: The likelihood at the time that serious harm would arise in this state from the defendant's misconduct." And the only other change is "the profitability of the defendant's misconduct in this state."

That takes care of plaintiff's 34.

MR. BEATTIE: By the way, it was understood that we were going to cross out the $100 million figure in their instruction.

THE COURT: What do you mean "it was understood"?

MR. BEATTIE: When we previously discussed the jury instructions, you said the amounts claimed would be stated --

THE COURT: On the verdict form.

MR. BEATTIE: Okay.

THE COURT: I was being asked whether I was going to write the numbers on the verdict form, and I said no, it comes in the jury instruction on damages.

On the noneconomic damage, there is a line that says the line may not exceed one million. In this case, there is an upper limit by law. It is what they prayed for, and it is

* * *

APPENDIX F

[Excerpt of Philip Morris's Petition for Review to the Oregon Supreme Court (Sept. 2004)]

IN THE SUPREME COURT OF THE STATE OF OREGON

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, DECEASED,

Plaintiff
Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, NKA PHILIP MORRIS USA INC.,

Defendant
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

Multnomah County Circuit Court

Case No. 9705-03957
CA A106791
SC _____

PETITION FOR REVIEW OF
PHILIP MORRIS USA INC.

Petition for Review of the decision of the Court of Appeals on remand by the United States Supreme Court, following defendant's appeal from a judgment of the Circuit Court for Multnomah County, Honorable Anna J. Brown

Opinion Filed:	June 9, 2004
Author of Opinion:	Edmonds, Presiding Judge
Before:	Edmonds, Presiding Judge Armstrong, Judge Wolheim, Judge

Reversed in Part and Remanded

September 2004

IF SUPREME COURT REVIEW IS ALLOWED, PETITIONER INTENDS TO FILE A BRIEF ON THE MERITS

William F. Gary, OSB 77032
Sharon A. Rudnick, OSB 83083
James E. Mountain, Jr., OSB 75267
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3248
Telephone: (541) 485-0220

Murray R. Garnick
Arnold & Porter LLP
555 Twelfth Street N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000

Attorneys for Defendant, Petitioner on Review

James S. Coon, OSB 77145
Raymond F. Thomas, OSB 79416
Douglas A. Swanson, OSB 80114
Swanson Thomas & Coon
820 SW Second Avenue, Suite 200
Portland, OR 97204
Telephone: (503) 228-5222

William A. Gaylord, OSB 73104
Gaylord Eyerman Bradley PC
1400 SW Montgomery St.
Portland, OR 97201
Telephone: (503) 222-3526

Kathryn H. Clarke, OSB 79189
921 SW Washington
Suite 764

Portland, OR 97205
Telephone: (503) 224-7963

Maureen Leonard, OSB 82316
520 SW 6th Avenue
Suite 920
Portland, OR 97204
Telephone: (503) 224-0212

Charles S. Tauman, OSB 77371
PO Box 19631
Portland, OR 97280
Telephone: (503) 849-9281

Attorneys for Plaintiff, Respondent on Review

James N. Westwood, OSB 74339
Stoel Rives LLP
900 SW 5th Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 294-9187

Attorneys for Amicus Curiae
Associated Oregon Industries

David F. Sugerman, OSB 86298
Paul & Sugerman PC
520 SW 6th Avenue, Suite 920
Portland, OR 97204
Telephone: (503) 224-6602

Steven C. Berman, OSB 95176
Stoll Stoll Berne Lokting & Shlachter
209 SW Oak Street, Suite 500
Portland, OR 97204
Telephone: (503) 227-1600

Attorneys for Amici Curiae Alliance for Lung Cancer Advocacy, Support and Education; American Lung Association of Oregon; American Heart Association; American Cancer Society; Tobacco Free Coalition of Oregon; and Oregon Trial Lawyers Association

Thomas W. Brown, OSB 80177
Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, OR 97205
Telephone: (503) 323-9000

Robin S. Conrad
National Chamber Litigation Center, Inc.
615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

Attorneys for Amicus Curiae Chamber of Commerce of the United Stales of America

Hardy Myers, OSB 64077
Michael D. Reynolds, OSB 74269
Department of Justice
1162 Court St., N.E.
Salem, OR 97301
Telephone: (503) 378-6002

Attorney for Judgment Creditor State of Oregon

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[7] court had erred in remitting the punitive damages award. The Court of Appeals therefore reinstated the jury's $79.5 million punitive damages award.

After this Court narrowly denied PM USA's Petition for Review of the Court of Appeals' decision in *Williams I*, the U.S. Supreme Court granted PM USA's petition for writ of certiorari, vacated the Court of Appeals' decision, and remanded the case to the Court of Appeals for reconsideration in light of *State Farm*. On remand, the Court of Appeals "readopt[ed] [its] previous opinion . . . including [its] statement of facts and [its] resolution of issues of Oregon and federal law." *Williams III*, 193 Or App at 530. The Court of Appeals reached the same result as in its previous decision – upholding both the fraud verdict and a punitive damages

award of $79.5 million, by far the largest punitive damages award ever sustained by an appellate court in Oregon. *Id.*, at 530-535.

I. Argument

A. The Jury Should Have Been Instructed That Its Award Of Punitive Damages Must Bear A Reasonable Relationship To The Harm To Williams And Not Be Based On Unproven Harm To Third Parties

This case presents this Court with the opportunity to resolve a conflict among panels of the Court of Appeals and address the jury instructions that should be given in light of *State Farm*. As the Court of Appeals previously recognized, due process requires that a punitive damages award bear a reasonable relationship to the harm suffered by the plaintiff. *Bocci*, 189 Or App at 359; *see also State Farm*, 538 US at 426. The Court of Appeals here, however, held that the jury need not be instructed on this principle because Oregon law allows punitive damages to be calculated based upon alleged harms to nonparties: "*State Farm* does not affect our previous conclusion that 'the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in [8] determining the amount of punitive damages.'" *Williams III*, 193 Or App at 556-557 (citing *Williams I*, 182 Or App at 64).

The Court of Appeals' reading of Oregon law is flatly inconsistent with its previous decisions and federal due process as delineated by the U.S. Supreme Court in *State Farm*. In *Bocci*, the Court of Appeals held that a punitive damages award should be based on the plaintiff's recoverable injuries, not

those of "someone else." 189 Or App at 361 n1; *see also id.* at 357-58 (punitive damages cannot he based on other parties' hypothetical claims). *Bocci* applied *State Farm*'s holding that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 US at 423. As the Supreme Court explained, allowing a defendant to be punished based on harm to nonparties is fundamentally unfair because [p]unish-ment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.*

PM USA's Requested Instruction 34 reflects this principle of law and should have been given: "Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons." *See* Def.'s Requested Instr. No. 34. Such an instruction was essential because "[i]f a jury fails to confine its deliberations . . . to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could he the subject of an independent lawsuit, resulting in a duplicative punitive award." *Williams v. ConAgra Poultry Co.*, 378 F3d 790, 797 (8th Cir. 2004).

[9] The Court of Appeals found that this concern did not apply in Oregon because ORS 30.925(2)(g) "requires a jury to consider evidence of punishments already imposed on the defendant when it considers the amount of an award of punitive damages," thus

protecting against multiple punishment. *Williams III*, 193 Or App at 556. However, ORS 30.925(2) is insufficient to satisfy due process under *State Farm*. As an initial matter, the statute only requires a jury to consider previous awards. The jury is not bound by such awards and may decide to disregard them altogether. Furthermore, there is no provision in the statute requiring juries to be told that previous awards already punished the defendant for harms specifically caused to the plaintiff at bar – even though this plaintiff was not a party to the previous lawsuit. Finally, the statute provides no mechanism to take into account earlier cases resulting in a defense verdict where the jury determined not to punish the defendant for harm to others, including the plaintiff at bar. Thus, a defendant could win 99 out of one hundred cases, but the jury in the hundredth case would not be told of those victories. Such a jury would still be permitted to punish for harms to one hundred people, and ORS 30.925(2) would offer no protection.

As the Supreme Court recognized, because nonparties are not bound by the judgment that other parties obtain, to allow punitive damages to be imposed as punishment for harm to others would be fundamentally unfair. *State Farm*, 538 US at 423; *see also ConAgra*, 378 F3d at 797 ("Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff . . . deprives the defendant of the safeguards against duplicative punishment.").

The Court of Appeals also concluded that the proposed instruction was an inaccurate statement of the law because it failed to recognize that, in considering the relationship between punitive damages

and the harm to the plaintiff, it is appropriate to consider [10] "potential harm" to nonparties. This conclusion is based upon a misunderstanding of the term "potential harm." As used by the Supreme Court, potential harm refers only to harm that the plaintiff would have suffered if the tortious scheme at issue had been successfully completed. *See TXO Prod. Corp. v. Alliance Res. Corp.*, 509 US 443, 462 (1993) (discussing the "potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme"); *BMW of N. Am., Inc. v. Gore*, 517 US 559, 580 (1996) (focus should be on "actual harm inflicted on the plaintiff"); *see also Cont'l Trend Res. Inc. v. OXY USA Inc.*, 101 F3d 634, 640 (10th Cir 1996) (potential harm "must be harm to these plaintiffs, not to others") (emphasis added). PM USA was entitled to have the trial court give Requested Instruction 34 because due process does not permit a court to use potential harm to nonparties to justify an excessive punitive damages award. *See State Farm*, 538 US at 423.

The Court of Appeals rejected PM USA's proposed instruction as "confusing" because it "informed the jury both that it may consider the harm to others in determining the reasonable relationship of its award to the harm caused to Williams and that it may not punish defendant for the impact of its misconduct on others." *Williams III*, 193 Or App at 557 n.6 (emphases in original). Again, the Court of Appeals' reasoning is inconsistent with its own prior holdings and *State Farm*. *State Farm* permits a jury to consider evidence of harm to nonparties to assist the jury in gauging the reprehensibility of a defendant's wrongful conduct. *State Farm*, 538 US at 422; *see also Bocci*, 189 Or App at 347-48. But as

the Court of Appeals recognized in *Bocci*, the jury cannot punish for harm to others or consider such harms in assessing the relationship between compensatory and punitive damages. 189 Or App at 361 n.l. It is this distinction that makes proper instructions so critical – to ensure that the jury considers the evidence before it within the proper constitutional framework. Unless [11] the jury is affirmatively instructed that it cannot punish for harm to others, it is likely to do so. Here, the jury was free to – and clearly did – base its punitive damages verdict on unconstitutional factors. Without informing the jury of constitutional limits with respect to punitive damages awards, the instructions were fundamentally inadequate to safeguard PM USA's due process rights. This Court should grant review to resolve the inconsistencies in the Court of Appeals' approach to alleged harm to third parties and to provide guidance regarding proper jury instructions on punitive damages.[2]

Finally, the error in failing to give Requested Instruction 34 was compounded because the instruction that was given affirmatively misled the jury as to the proper range of any punitive damages award. Specifically, the trial court informed

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[2] There can be no doubt that the trial court's failure to give PM USA's Requested Instruction 34 (or any comparable instruction) prejudiced PM USA, warranting reversal. *See Beall Transp. Equip. Co. v. S. Pac. Transp.*, 186 Or App 696, 703, 64 P3d 1193 (2003). Plaintiff took full advantage of the instructional error to urge the jury repeatedly to punish PM USA for the deaths of thousands of other unidentified people, whose claims were never presented or proven in court. See Tr. Vol. 24C at 97, 23B at 91; see also Tr. Vol. 9B at 138; Tr. Vol. 11B at 41; Tr. Vol. 17A at 138.

the jury that "[t]he amount of punitive damages you assess may not exceed the sum of 100 million dollars." Tr. Vol. 25 at 50-51. In its original opinion, the Court of Appeals upheld the use of the instruction because it "merely told the jury what plaintiff sought" in the complaint, and was "consistent with ordinary Oregon trial practice." *Williams I*, 182 Or. App at 64.[3] However, the instruction did not explain to the jury that the $100 million number was nothing more than "what plaintiff sought." Rather, the instruction told the jury only that it was free to award up to $100 million. This was the only reference point the jury was given. Thus, the instruction encouraged the jury to award an amount of punitive damages that was unconstitutionally excessive as well as inconsistent with *State Farm* and the Court of [12] Appeals' subsequent rulings in *Bocci* and *Waddill*. In *State Farm*, the Supreme Court held that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 US at 425. The $100 million figure in the instruction was a far cry from the single-digit ratio endorsed by the Supreme Court.

B. The Punitive Damages Award Is Unconstitutionally Excessive

This case also presents this Court the opportunity to reconcile the Court of Appeals' inconsistent application of *State Farm* and to provide guidance to

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[3] Although the Court of Appeals did not revisit this ruling in *Williams III*, the Court stated that its "failure to discuss any issue that defendant raises on remand indicates that we are satisfied with our previous resolution of that issue." 193 Or App at 530.

the bar and bench regarding constitutional limits on punitive damages awards. The jury's $79.5 million punitive damages award cannot survive the scrutiny required by *State Farm*. Although there is no "bright-line ratio which a punitive damages award cannot exceed," the *State Farm* Court concluded that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 US at 425. The Court pointedly repeated its earlier observation in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 US 1 (1991), "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 US at 425. The only circumstance the Court has identified that might warrant a higher ratio is where "a particularly egregious act has resulted in only a small amount of economic damages." *Id.* That is clearly not the case here, where the plaintiff was awarded over $500,000. To the contrary, far more relevant is the Court's admonition that "[t]he converse is also true . . . . When compensatory damages are substantial . . . a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

The Court of Appeals applied these principles to reduce punitive damages awards in the two other cases remanded by the U.S. Supreme Court following *State Farm*. *See Bocci*, 189 Or App at 360; *see also Waddill*, 190 Or App at 182. For example, in *Bocci*, the Court

* * *

APPENDIX G
[Transcript of Proceedings in the Oregon Supreme Court (Sept. 11, 2007)]

IN THE SUPREME COURT OF THE STATE OF OREGON

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, Deceased,
Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, NKA PHILIP MORRIS USA INC.,
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., AND PHILIP MORRIS COMPANIES, INC.,
Defendants.

Multnomah County Case No. 9705-03957
CA A106791
SC S51805

TRANSCRIPT OF PROCEEDINGS

ORAL ARGUMENT
SEPTEMBER 11, 2007

BEFORE:

CHIEF JUSTICE DeMUNIZ
JUSTICE GILLETTE
JUSTICE DURHAM

* * *

[Tr. 16] requirement, such as the requirement that you request an instruction is an adequate state ground for denying relief, is qualified.

The Court -- the Supreme Court will defer to state court procedural rules, so long as the rules are consistently applied, and so long as they serve a legitimate state purpose. I think that's exactly consistent with what this Court has said in its own preservation rulings; that is, in George you recognize the application of the correct-in-all-respects rule would not make any sense in terms of the purposes that preservation is designed to serve --

JUSTICE GILLETTE: Our interpretation as to whether George is binding, useful or irrelevant, however, is an interpretation which, given any of those three possibilities, the United States Supreme Court wouldn't care about for one second. That is to say, it assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on the George, for the Court to assume anything different nor for you to claim anything different, Mr. Gary.

MR. GARY: I can't really say that I agree with that until I see what the Court has to say. But of course the Supreme Court has presumed that this Court acted in good faith, as do we --

* * *

OPPOSITION BRIEF

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(2)

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No. 07-1216

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF IN OPPOSITION

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
820 SW Second Avenue
Suite 200
Portland, OR 97204
(503) 228-5222

ROBERT S. PECK*
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
(202) 944-2803

WILLIAM A. GAYLORD
GAYLORD EYERMAN
BRADLEY P.C.
1400 SW Montgomery St.
Portland, OR 97201
(503) 222-352

CHARLES S. TAUMAN
BENNETT HARTMAN
MORRIS & KAPLAN
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

*Counsel of Record
Additional counsel on inside cover

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
P.O. Box 11960
Portland, Oregon 97211
(503) 460-2870

QUESTIONS PRESENTED

The Oregon Supreme Court first reviewed this case after this Court granted, vacated, and remanded (GVR) the matter for reconsideration in light of *State Farm Mutual Automobile Insurance Co., v. Campbell*, 538 U.S. 408 (2003). The Oregon courts reviewed various federal claims made by Philip Morris based on *State Farm* and reinstated the verdict. Neither court, however, considered the state law issues raised and briefed by Respondent throughout the litigation. This Court granted certiorari and then announced a new rule involving legitimate and illegitimate uses of evidence concerning harm to others and indicated that certain protections must be provided "upon request." On remand, the Oregon Supreme Court reached Respondent's other claims about the propriety of Petitioner's request for a jury instruction.

In light of this history, the questions presented by the Petition should properly be considered to be:

1. Whether, after this Court remanded a case to state court with instructions to apply a new standard to be invoked "upon request," the state court may consider state law grounds previously asserted and briefed to decide whether such a proper request was made.

2. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict or whether the reprehensibility of defendant's misconduct remains "the most important indicium of the reasonableness of a punitive damages award."

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Mayola Williams respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Oregon Supreme Court's most recent decision in this case.

STATEMENT OF THE CASE

Each of the Oregon Supreme Court's decisions in this case has been on remand from this Court. After the Oregon Court of Appeals heard the first appeal from the trial court, the state's high court declined discretionary review. This Court issued a GVR in light of its new decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). The Oregon Court of Appeals and the Oregon Supreme Court then reviewed the case under the federal standards set forth in that case. Both courts declined at that time to consider Respondent's state-law arguments because they believed their understanding of the federal issue was dispositive.

This Court subsequently granted certiorari. After briefing and oral argument, it reversed and remanded so that the Oregon Supreme Court could apply the new standard it announced. *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1065 (2007). The Court reaffirmed "a State's legitimate interest in punishing unlawful conduct and deterring its repetition." *Id.* at 1062 (citation omitted). It also specifically endorsed the propriety of the Oregon Supreme Court's prior ruling that a "'jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.'" *Id.* at 1064, quoting Pet. at 48a. It further held that

"[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* Thus, a jury may punish misconduct to reflect the degree of its reprehensibility.

At the same time, however, a jury may not go further and directly "punish for harm caused strangers," 127 S.Ct. at 1064, because there is "no opportunity to defend against the charge, by showing, . . . that the other victim was not entitled to damages." *Id.* at 1063.

This Court required that, in appropriate cases and when properly requested, there be some protection against juries answering the "wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." 127 S.Ct. at 1064. It found the grounds upon which the Oregon court rejected Philip Morris's Requested Instruction No. 34 unclear: although "one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility," "we believe that the Oregon Supreme Court applied the wrong constitutional standard." *Id.* at 1064, 1065. That belief was based on a footnote in the Oregon court's opinion that opined that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus," and "[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 1064-65, quoting 127 P.3d, at 1175, n. 3 (Pet. at 49a n.3).

The case was remanded to the Oregon Supreme Court to "apply the standard" now enunciated for the first time. *Id.* at 1065. That standard requires that where the risk of a jury misunderstanding the legitimate role of evidence concerning harm to others is "significant," the trial court "upon request, must protect against that risk." *Id.* The Court gave states flexibility to decide what kind of process to afford but insisted that states must provide "*some* form of protection in appropriate cases." *Id.* (emphasis by the Court).

Upon remand, the Oregon Supreme Court meticulously reviewed this Court's decision and faithfully followed it. *See* Pet. at 3a, 7a-12a. This Court required protection against jury confusion "upon request," and the Oregon Supreme Court considered that requirement first, including objections to Philip Morris's requested instruction raised by Mrs. Williams throughout the litigation, *see* Pet. at 9a n.2, some of which were ruled upon by the trial court in Respondent's favor. The court found that Philip Morris's legally erroneous and self-contradictory proposed instruction failed to satisfy reasonable and longstanding state-law requirements on what constitutes a proper request.

Nothing in this Court's prior opinion required Mrs. Williams to abandon her state-law grounds for rejecting the requested instruction. Contrary to Philip Morris's naked assertion that the Oregon Supreme Court applied a "rule that had never before been invoked by any Oregon court during the nine years of appellate litigation in this case," Pet. at 2, the Oregon courts, in this very matter, had repeatedly asserted the venerable "clear and correct

in all respects" requirement. *See, e.g.*, Pet. at 140a & 52a. Once the Oregon court determined there was no error in denying Philip Morris's Requested Instruction No. 34, the court had no cause to reexamine again the size of the punitive damage award for gross excessiveness under the Due Process Clause.

A. TRIAL

The claim that gave rise to this litigation involved a massive market-directed fraud driven by deliberate decisions at the company's highest levels that were intended to deceive customers and knowingly endanger their health in order to reap enormous profits. It was one of the longest running, most profitable, and deadliest frauds in the annals of American commerce, and one that continued until after the verdict in this case. Undertaken in concert with other cigarette manufacturers, the scheme led by Petitioner created the largest preventable public health disaster of the twentieth century. Philip Morris knew that their seemingly science-based campaign to dispute that smoking caused cancer would have a special impact on those who were highly addicted, as Jesse Williams was. Yet, for more than 40 years, Philip Morris knew, and admitted internally, that what they were denying was actually true: cigarettes cause lung cancer.

For example, in response to the 1964 Surgeon General's Report that smoking contributed substantially to mortality rates from lung cancer and other diseases, a Philip Morris vice president wrote that "we must, on a future basis, give smokers a psychological crutch and self-rationale to continue smoking." Pet. at 32a. Thereafter, the self-described

"brilliantly conceived and executed" public relations strategy to "defend itself' in "litigation, politics, and public opinion" was altered from the "vigorous denial" approach to a "counter propaganda" plan. J.A. 240a (2006 filing); Ex. 80 at 7-8, 83 at 1. In short, the new plan was designed to suggest "ready-made credible alternatives" to the idea that smoking causes disease, while still insisting that there was "no proof that smoking causes cancer." J.A. 319a. Philip Morris maintained this position as the industry leader throughout the 1970s, 1980s, and 1990s.

The evidence at trial established that Jesse Williams died of lung cancer in 1997 as a result of Philip Morris's lethal fraud. By then, Philip Morris had known for at least 40 years that cigarettes cause cancer and that millions of American smokers, about half of whom were Philip Morris customers, were addicted to the nicotine in cigarettes.

Although evidence established the breadth and general effectiveness of this extensive campaign, no evidence was adduced of other individuals who suffered harm. In support of a lesser assessment of reprehensibility, Philip Morris conceded that "[t]he jury found that one person – Jesse Williams – was harmed by the purported 'false controversy.'" Defendant's Reply Br. in Support of Motion for Reduction of Punitive Damages Award at 4-5.

Before closing arguments, Philip Morris proposed an extensive punitive damages instruction, its No. 34, spanning three-and-a-half pages, which the trial court reviewed on March 23, 1999. Pet. at 155a. The instruction, *inter alia,* would have told the jury:

- that it could consider harm suffered by non-parties in determining the reasonable relationship between punitive and compensatory damages.

- that the extent of harm to others was, with reprehensibility, "the paramount consideration" in evaluating punitive damages.

- that Philip Morris could be punished only to the extent that the harmful effects of cigarettes were unknown to the public.

- that the reprehensibility of Philip Morris's misconduct depended in part on the extent of its motivation to receive "illicit" profit from the sale of a legal product.

- that the Oregon statutory punitive damages factors were among the considerations the jury "may find to bear" on reprehensibility; and,

- that it could not "allow [its] decision to be influenced by the defendant's financial condition" but could "consider the defendant's financial condition as part of the process of arriving at an appropriate punishment."

App. at 1a-4a. Each of these were wrong as a matter of federal or state law.

At the instructional conference, focusing on the language Philip Morris says constituted a clarifying instruction on harm to others, the judge asked Philip Morris's counsel whether precedent requires an instruction "about proportionality." Pet. at 159a. Counsel responded, "It has always been addressed

post-verdict." *Id.* The judge then replied, "That's where I'm going to address it then." *Id.* The judge further explained that there was no need to instruct the jury not to compensate "for other claimants who haven't yet come to court," because "we have already told the jury that punitive damages are not compensatory damages." Pet. at 161a. The judge further stated that the point is "adequately guarded against by telling the jury punitive damages are not designed to . . . 'compensate plaintiff or anyone else for damages caused by defendant's conduct." Pet. at 162a. Rather than reject the idea that a jury may not punish for harm to others, the judge said, "we are not here to punish for other plaintiffs' harms." App. at 6a.

Plaintiff's counsel then raised objection to the use of the term "illicit profits," App. at 18a, which the Oregon Supreme Court later also found to be a fatal defect. Pet. at 20a-21a. The trial court agreed and declined to instruct on "illicit" profit. App. at 19a.

As this history makes clear, Philip Morris mischaracterizes the trial court's rejection of its proposed instruction when it claims that the trial judge determined that an instruction on harm to others "was *not* constitutionally required." Pet. at 4. *Cf.* App. at 6a (The court: "we are not here to punish for other plaintiffs' harms"). The trial court made no such holding but instead determined that no precedent required the court to give defendant's legally incorrect, argumentative, and confusing instruction. App. at 9a-10a, 13a-14a, 18a-19a. After closing argument, Philip Morris took exception to the trial court's failure to give its No. 34 *as a whole*. App.

at 23a ("We also take exception to the court's failure to give Defendant's 34 on punitive damages.").[1]

B. OREGON COURT OF APPEALS PROCEEDINGS

1. The 2002 Decision

On appeal, Philip Morris did not argue that the trial court should have instructed the jury not to punish it for causing harm to others. Its argument to the court of appeals (and to the Oregon Supreme Court thereafter) was that the trial court should have instructed that "punitive damages should bear a reasonable relationship to Williams' harm." Respt's Br. in Court of Appeals at 8, 44. Respondent's claim that it contended that "the jury should have been instructed not to impose punitive damages to punish for harms to non-parties" is simply false. Pet. at 5.[2]

The court of appeals rejected Philip Morris's argument that a proportionality instruction should have been given, noting that proposed instruction No. 34 was not correct in all respects. Pet. at 140a,

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[1] Although this Court assumed that Philip Morris asked for its instruction in response to closing arguments, 127 S.Ct. at 1061, 1063, the instructional conference in fact took place the day before closing arguments began. App. at 22a.

[2] Under Oregon's Rules of Appellate Procedure, Philip Morris failed to preserve the argument on which it now relies. ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court and is assigned as error in the opening brief.").

citing *Simpson v. Sisters of Charity of Providence in Oregon,* 588 P.2d 4 (Or. 1978). Philip Morris' repeated contention that the Oregon courts "never identified" the "clear and correct in all respects rule" is thus not true. The court of appeals also specifically acknowledged that Plaintiff raised other issues in the requested instruction that it did not reach. Pet. at 140a.

2. The 2004 Decision

After the Oregon Supreme Court denied discretionary review, this Court returned the case to the Court of Appeals for reconsideration in light of its new decision in *State Farm. See Philip Morris USA, Inc. v. Williams,* 540 U.S. 801 (2003). The Court of Appeals found nothing in *State Farm* that changed its analysis of the instructional issue. In addition, the court noted that

> As plaintiff points out, defendant's proposed instruction is also confusing, and the trial court could properly have refused to give it for that reason.

Pet. at 105a, n.6.

C. OREGON SUPREME COURT PROCEEDINGS

1. The 2006 Decision

While most of its opinion after the *State Farm* remand addressed due process excessiveness, the Oregon Supreme Court agreed with the Court of Appeals that Requested Instruction No. 34 "was incorrect under state law," because it would not

permit the jury to "consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large." Pet. at 48a. Citing *Hernandez v. Barbo Machinery Co.*, 957 P.2d 147 (Or. 1998), the Court found no error in refusing a requested jury instruction that "'is not correct in all respects.'" Pet. at 52a. As explained in its 2008 decision, the Oregon Supreme Court "did not need to address [plaintiff's] alternate arguments" about why the request for Instruction No. 34 was incorrect because of its holding on the "federal due process" issue. Pet. at 9a n.2.

2. The 2008 Decision

On remand from this Court's 2007 decision, the Oregon Supreme Court revisited the instructional issue again. After extensively detailing that decision, the Oregon Supreme Court described its task as applying the new "constitutional standard," which meant that it had to determine "whether the trial court erred in refusing to give proposed jury instruction No. 34." Pet. at 12a-13a. The Court first undertook to address state law issues that Respondent had raised throughout the proceedings. The court reviewed its "well-understood standard governing claims of error respecting a trial judge's refusal to give a proffered instruction" and stated that reversal will be denied "unless the proposed instruction was '"clear and correct in all respects, both in form and in substance, and . . . altogether free from error."' Pet. at 14a, quoting *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975).

The Oregon court acknowledged that the plaintiff had taken issue, *inter alia*, with the requested

instruction's treatment of the state statutory factors as merely permissive, as well as its focus on motivation to obtain "illicit" profits. The court "agree[d] with plaintiff on both points." Pet. at 15a. Philip Morris made no effort to defend the correctness of proposed instruction No. 34 on any of the grounds Plaintiff raised.

The court held that proposed instruction No. 34 contained legal error and was not therefore "correct in all respects" as required under Oregon law. Pet. at 21a.

REASONS FOR DENYING THE PETITION

I. PHILIP MORRIS HAS MISREPRESENTED THE RULING BELOW

Philip Morris has seriously misrepresented the decision below, as it has the decision of the trial judge. In a bid to make it appear that the Oregon courts are operating in "defiance" of this Court, Pet. at 13, Philip Morris purports to quote the Oregon Supreme Court and claim that it "refused to 'address the constitutional standard that the United States Supreme Court has articulated' and instead 'adhere[d] to' the opinion that this Court had rejected." Pet. at 11-12. To manufacture such a quotation, Philip Morris ignores what that court said and what it meant, which was:

> it is our task to apply the constitutional standard set by the Supreme Court . . . however, there is a preliminary, independent state law standard that we must consider, *before* we address the

> constitutional standard that the United States Supreme Court has articulated.

Pet. at 12a-13a (emphasis added). In doing so, that court was operating as this Court suggested:

> we understand the Court's use of the phrase, "upon request", to be an acknowledgement of the authority of states to place reasonable procedural requirements on any request for instructions. . .

Pet. at 13a n.4 (citation omitted).

After performing a thorough analysis that spans nine pages in the Petition's Appendix, the Oregon Supreme Court concluded that

> even assuming that proposed jury instruction No. 34 clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly. Accordingly, the trial court did not err in refusing to give it.

Pet. at 21a. The court then reaffirmed the "remaining aspects of the judgment against defendant." Pet. at 21a.

Misrepresentation also is the most charitable description that can be given to Philip Morris's statement that the longstanding procedural rule relied upon by that court constitutes a "novel and patently unreasonable application" of a rule "never before . . . invoked by any Oregon court during the

nine years of appellate litigation in this case." Pet. at 2. In fact, the rule was repeatedly invoked by the plaintiff, the Oregon Court of Appeals, and the Oregon Supreme Court. *See* Pet. at 52a & 140a. The flaws identified by the court below were identified at trial and throughout the appellate process. *See, e.g.*, Pet. at 9a, 140a; App. at 19a; Appellant's Reply and Cross-Responding Br. in Court of Appeals, May 2001, at 34-35.

Given the wide gulf between what has actually transpired in this case and what Philip Morris claims has occurred,[3] Respondent respectfully submits that this case is a particularly poor vehicle for the exercise of this Court's discretion to assert jurisdiction.

II. THE OREGON SUPREME COURT FAITHFULLY APPLIED THIS COURT'S STANDARD ON REMAND

A. Oregon Properly Considered Respondent's Timely State Law Objections to the Proposed Instruction

In its decision last term, this Court stated that it "believe[d]" that the Oregon Court had "applied the

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[3] Philip Morris also claims it "argued at the charge conference that the Constitution prohibits punishment for harm to non-parties." Pet. at 22, citing Pet. at 162a. A casual statement, unsupported by authority, that "I suppose you could declare the statute unconstitutional at some level" does not constitute preservation of a constitutional objection. *See Oregon v. Wyatt*, 15 P.3d 22, 27 (Or. 2000).

wrong standard" and remanded for reconsideration and application of the proper standard. That standard is that "upon request" in appropriate cases a court must protect against a significant risk that a civil jury might award punitive damages to punish for harm to non-parties. 127 S.Ct. at 1065. The Oregon Supreme Court understood that holding. Pet. at 11a. It "review[ed] that opinion in some detail." Pet. 9a. *See* Pet. at 7a-12a (describing and quoting from this Court's opinion). Philip Morris does not dispute the Oregon Supreme Court's description of this Court's opinion.

The Oregon Supreme Court also understood that the new constitutional rule announced by this Court "arose in the context of the trial court's refusal to give a particular proposed jury instruction that defendant had requested." Pet. at 3a. Agreeing with Plaintiff's well-preserved argument, the Oregon Supreme Court held that Philip Morris, in its Requested Instruction No. 34, had not made a proper request.[4] Pet. 21a. Its holding plainly applied the "upon request" provision of this Court's remand standard, finding it had not been satisfied. *See* Pet. 13a n.4.

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[4] Philip Morris's attempt to compare the Oregon Supreme Court to South Carolina's in *Yates v. Aiken*, 484 U.S. 211 (1988), Pet. at 14, is unavailing. In *Yates*, this Court found that South Carolina wrongly ignored a decision that predated its ruling and had no procedural requirements that prevented application of that decision. Neither condition adheres to this matter.

The Oregon Court directly addressed this Court's remand instruction.[5] Petitioner's accusations of "defiance" and "disobedience" are groundless.

B. The Oregon Courts Could Not "Waive" Mrs. Williams's State Issues

Philip Morris concedes that the Oregon Supreme Court "unquestionably had the authority to interpose a valid independent and adequate state ground for refusing to consider the claim," but complains that "the Oregon courts lost the prerogative to invoke a state-law procedural bar" by not ruling on it in three prior "opportunities." Pet. at 16.

Yet, in its most recent decision, the Oregon Supreme Court noted that Plaintiff had consistently argued "that the refusal to give proposed instruction No. 34 was not error, because that instruction

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[5] Philip Morris, here as it did in the Oregon Supreme Court, asks for a new trial on the theory that the remand instruction was not addressed. Pet. at 15. While that is wrong and no flaw in the opinion below justifies the prayed-for remedy, Mrs. Williams submits that any appeal for a new trial would be manifestly unfair to a plaintiff nine years after the original trial and inappropriate under *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). There, this Court insisted on "a *de novo* standard of review when passing on [trial] courts' determinations of the constitutionality of punitive damage awards," which it held does not inappropriately intrude on the proper function of juries or trial courts. *Id.* at 436, 437-40. This Court anticipated that the Oregon Supreme Court's *de novo* review of the award would cure any constitutional defect. 127 S.Ct. at 1065.

misstated other points of law." Pet. at 9a n.2. This Court, among others, has long noted that "as the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 478 n.20 (1979). *Accord Outdoor Media Dimensions, Inc. v. Oregon,* 20 P.3d 180, 195-96 (Or. 2001).

Mrs. Williams's consistently reiterated objections distinguish this case from the controversy in *NAACP v. Alabama ex rel. Patterson,* 360 U.S. 240 (1959) (*per curiam*), on which Philip Morris relies. Pet. at 17-19. *Patterson* holds only that a litigant cannot invoke and a state court cannot rely on arguments *presented for the first time after remand.* 360 U.S. at 242-43. The burden had been on the party, not the court, to make and preserve those arguments. Moreover, in *Patterson,* but not here, prior state court precedent, on which Petitioner NAACP had properly relied, was inconsistent with the new procedural obstacles that the court devised. *See NAACP v. Alabama,* 357 U.S. 449, 457-58 (1957). In this case, as detailed below, the ruling was consistent with longstanding Oregon precedent.

Here, Mrs. Williams has repeatedly invoked Oregon's well-established "clear and correct in all respects" standard and has identified numerous state-law flaws in the instruction. This is not an instance of result-oriented pretext by a court, but instead a court addressing a party's timely objections as alternate grounds for its holding.

C. There is no Requirement that State Law Issues Precede the Determination of Federal Issues

It is Philip Morris, rather than the Oregon Supreme Court, that has asserted a novel and unprecedented "requirement" when the company claims that the "Oregon courts were required to apply [state rules] *before*—and not *after*—this Court decided the federal issue." Pet. at 3. Courts retain discretion to determine which issues they will address, which they find unnecessary to address, and in what order they will address them. *Cf. Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) (finding it would not be a sensible exercise of discretion to address unnecessary issues). Even if it is often prudent to decide state issues before addressing federal constitutional issues, there is no requirement that the issues be resolved in that fashion.

Oregon's usual practice of considering state grounds before addressing federal issues in appropriate cases is based on the idea that where state law properly disposes of a question, there is no federal constitutional violation. *See, e.g., Oregon State Police Officers' Ass'n v. Oregon*, 783 P.2d 7, 10-11 (Or. 1989) ("The state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."). That may support a prudential practice of considering state issues first, but it is not a

requirement from which courts may not vary.[6]

In fact, other state courts have addressed federal constitutional concerns first. Thus, for example, in *Vermont v. Badger*, 450 A.2d 336 (Vt. 1982), the Vermont Supreme Court first analyzed search-and-seizure and self-incrimination questions under the Fifth Amendment and then reached the cognate issues under the state constitution afterwards, resolving the matter on adequate and independent state-law grounds, an order of analysis that Philip Morris contends is prohibited. Vermont's court is not the only one to have adopted that order of analysis. *See, e.g., Avdel Corp. v. Mecure*, 277 A.2d 207, 209 (N.J. 1971) (looking "first to the rulings of the United States Supreme Court" to determine the due process limits of the state's long-arm rule).

III. OREGON'S 'CLEAR AND CORRECT' RULE IS FIRMLY ESTABLISHED AND REGULARLY FOLLOWED

Philip Morris's claim that it had no notice that Oregon followed the "clear and correct in all respects" rule or that it could be applied as the Oregon Supreme Court did in its most recent review, Pet. at 20, cannot be taken seriously. The "clear and correct"

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[6] Recently, the Oregon Court of Appeals reviewed a constitutional challenge by first examining federal due process grounds and, because that did not dispose of the matter, *then* reached claims that the practice violated the Oregon Constitution. *Smith v. Dept of Corrections*, -- P.3d ---, 2008 WL 942656 (Or. App. Apr. 9, 2008). Clearly, there is no requirement that Oregon courts first dispose of state issues before reaching federal ones.

rule was invoked by the Oregon appellate courts three different times in this case, including the decision below. Pet. 14a, 52a, 140a. The rule dates back to 1916 in Oregon, *Sorenson v. Kribs,* 161 P. 405, 409-10 (Or. 1916), and has been applied consistently since then.[7]

A. Oregon's "Clear and Correct in All Respects" Rule is Not Novel

The Oregon Supreme Court held that the trial court did not err in refusing Philip Morris's Requested Instruction No. 34 because the instruction was not "clear and correct in all respects," as it must be to comprise reversible error under Oregon law. Pet. at 21a. That is an independent and adequate state law ground for upholding the jury's verdict, *id.* at 13a, and provides no basis for this Court to exercise jurisdiction over the matter. *See Lee v. Kemna,* 534 U.S. 362, 376 (2002) ("Ordinarily, violation of 'firmly established and regularly followed' state rules – for example, those involved in this case--will be adequate to foreclose review of a federal claim."), quoting *James v. Kentucky,* 466 U.S. 341, 348 (1984).

Philip Morris contends that this Court should summarily reverse the Oregon Supreme Court's decision because it says that this procedural bar "is an arbitrary rule that is neither firmly established nor regularly followed, and of which Philip Morris

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[7] Philip Morris conflates assertions that the "clear and correct" rule has not been applied in this case with implications that the rule is not firmly established and regularly followed. *E.g.* Pet. at 26. Neither is true.

had no fair notice when presenting its proposed jury instructions." Pet. at 20. While the claim is preposterous, Philip Morris finds itself in this predicament because of its own decision to tie several propositions of law together in its legally erroneous Instruction No. 34.

This "novel" rule was considered "well settled" nearly 50 years ago. *Wiebe v. Seely*, 335 P.2d 379, 393 (Or. 1959). It was adopted in 1916, when the Oregon Supreme Court considered whether to adopt a rule that an instructional request, however flawed, would suffice to "call the attention of the court to the matter" or, on the other hand, to join what it characterized as the "great weight of authority",[8] concluding:

> In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error.

Sorenson, 161 P. at 410 (quotation omitted).

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[8] The court found that 15 states (Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Maine, Maryland, Michigan, New York, Ohio, Oklahoma, Utah, and Wisconsin) followed the "correct in all respects" rule without contradiction. 161 P. at 410.

The rule has been restated, followed, and relied upon by the Oregon appellate courts in numerous cases, including a decision one year before trial in this case. *See Hernandez,* 957 P.2d at 151. *See also,* App. at 27a-28a (detailing Oregon cases).

Instructions that had valid parts have been properly refused because they "contained objectionable language," *Simpson,* 588 P.2d at 13; because they called upon the jury to make inferences outside the pleadings, *Dacus v. Miller,* 479 P.2d 229, 231-32 (Or. 1971); because they failed to "embod[y] the essentials as set out" in the relevant statute, *McCaffrey v. Glendale Acres,* 440 P.2d 219, 222 (Or. 1968); and because they contained "erroneous descriptions of the relevant statute." *Roop v. Parker Northwest Painting Co.,* 94 P.3d 885, 904 (Or. App. 2004). Requested instruction No. 34 contained similar fatal flaws that Mrs. Williams had previously identified. *See* pp. 25-31 *infra.*

The "clear and correct" rule is not an Oregon local invention. As long ago as 1864, in a case twice heard and concerning three series of instructions denied, this Court stated:

> if any proposition in the series ought to have been rejected, then *the court did not err in refusing the prayer, although there might have been propositions in the series, which, if asked separately, ought to have been given.*

Harvey v. Tyler, 69 U.S. 328, 338 (1864) (emphasis added). *See also Beaver v. Taylor,* 93 U.S. 46, 54 (1876) (emphasis added) (no error in refusing an instruction where it "was presented as one request;

and, *if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained.*) States other than Oregon have long applied a similar rule as well. *See* App. at 29a-30a.

Philip Morris also claims that Oregon does not regularly follow the "clear and correct in all respects" rule, accusing the Oregon Supreme Court of failing to apply its own precedent, *Oregon v. George*, 97 P.3d 656 (Or. 2004). The argument is unavailing, as the decision below makes plain. In *George*, the court held that a criminal defendant need not request a jury instruction on the consequences of an insanity verdict, under a statute that required the trial court to give such an instruction, *whether requested or not. Id.* at 662. *George* is therefore plainly distinguishable from the present case as there is no mandatory state statute supporting Philip Morris's proposed instructional language.

Nevertheless, Philip Morris seizes on alternative language in *George*, in which the court said it would not require an "exercise in futility." Pet. at 26, quoting 97 P.3d at 662. Nothing in the record, however, indicates that it would have been futile for Philip Morris to offer a correct jury instruction instead of its No. 34 or to draw the court's attention to issues it now has discovered with Plaintiff's closing argument. After closing arguments, Philip Morris took exception to refusal to give its No. 34 only as a whole, not in specific reference to any portion of it. App. at 23a. The Oregon Supreme Court specifically found that Philip Morris's complaint of "futility" was groundless on this record. Pet. at 16a n.5.

In Oregon, as in other jurisdictions, a trial judge is under no obligation to reformulate a party's flawed proposed jury instruction. *See Beglau,* 536 P.2d at 1256 ("The trial court cannot be required to edit proposed instructions and to omit parts that are incorrect or inapplicable."); *Brigham v. Southern Pac. Co.,* 390 P.2d 669, 671 (Or. 1964); *Hooning v. Henry,* 213 P. 139, 141 (Or. 1923). *Cf. Public Service Co. of Oklahoma v. Bleak,* 656 P.2d 600, 608 (Ariz. 1982) (not the duty of trial court to correct instruction and "separate the sheep from the goats"); *Roberts v. City of Los Angeles,* 167 Cal. Rptr. 320, 322 (Cal. App. 1980); *Duncan v. Strating,* 99 N.W.2d 559, 660 (Mich. 1959); *Hertz v. McDowell,* 214 S.W.2d 546, 550 (Mo. 1948); *Wrangham v. Tebelius,* 231 N.W.2d 753, 757 (N.D. 1975); *Martin v. Dayton Power & Light Co.,* 156 N.E.2d 328 (Ohio. App. 1958); *Honsinger v. Egan,* 585 S.E.2d 597, 601 (Va. 2003).

Because Philip Morris and its counsel, "like everyone else, is presumed to know the law," *In re Conduct of Devers,* 974 P.2d 191, 197 (Or. 1999) (citation omitted), Philip Morris cannot contend in good faith that it had no notice of the relevant Oregon rule at the time it presented its proposed jury instructions, cannot contend in good faith that the rule was invented for this case,[9] and cannot aver in

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[9] In *Allison v. Fulton-DeKalb Hosp. Auth.,* 449 U.S. 939 (1980) (mem.), this Court dismissed a case from the Georgia Supreme Court for lack of jurisdiction where the Georgia court had avoided deciding the petitioner's federal constitutional claim on a newly announced state procedural rule, which conflicted with the state's civil practice statute and required litigants to raise federal constitutional claims earlier than other claims. Notice

good faith that the rule was applied in any fashion other than normally.[10]

B. Oregon's Supreme Court Did Not Err in Finding Requested Instruction No. 34 Not 'Clear and Correct in all Respects'

The Oregon Supreme Court's ruling that Requested Instruction No. 34 was not "clear and correct in all respects" is an independent and adequate ground for upholding the jury's verdict. *See Osborne v. Ohio*, 495 U.S. 103, 123 (1990) (failure to follow state law in requesting jury instruction "constitutes an independent and adequate state-law ground preventing us from reaching [party's] due process contention on that point."). Oregon's Supreme Court plainly relied upon the rule in its decision. Pet. at 13a. *Cf. Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) (state procedural bar actually relied upon by state court "as an independent basis for its disposition of the case" acts to "deprive this Court of jurisdiction"). It also responds to this Court's requirement there be a "request" for protection against an unreasonable risk of jury confusion as to the proper use of evidence of harm to others than plaintiff. 127 S.Ct. at 1065.

Philip Morris complains that the ways in which the Oregon court found proposed No. 34 erroneous comprise tangential "trivialities" – found in "other

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thus does not appear to be part of the adequate and independent state grounds inquiry.

10 *See* pp. 32 to 34 *infra* on Oregon's legitimate interest in its rule.

unrelated parts" of the instruction that did not concern punishment for harm to others. Pet. at 23, 25. Indeed, the Oregon court limited its analysis to errors of state law in proposed No. 34. Pet. at 15a-22a. Mrs. Williams had raised these and other objections throughout the case. Even though the Oregon Supreme Court did not reach some of these objections, all support rejecting the instruction under Oregon law. Still, Philip Morris fails to acknowledge that the very sentence that includes its proposed language about the impropriety of punishment for harm to others unquestionably misstates federal law concerning the *proper* use of harm to others in the punitive damage calculus.

1. Defendant's No. 34 misstated the relevance of the Oregon statutory factors

By statute, punitive damages, if any, "*shall* be determined and awarded based upon" specific enumerated statutory criteria. ORS 30.925(2) (emphasis added). Those criteria are limited to the likelihood of harm, defendant's knowledge, profitability of misconduct, and other factors. The statute is mandatory and exclusive, providing the only criteria on which the determination and award of punitive damages "shall be" based. Defendant's No. 34 proposed making that mandatory language permissive by advising that the jury "may find" the factors useful in assessing reprehensibility and leaving the door open to other unspecified factors. App. at 3a. Nothing in this Court's jurisprudence would justify loosening the statutory requirements by adding to the jury's discretion in this way.

To allow the jury such arbitrary leeway to devise their own criteria, as the language permitted, would not only have been error under ORS 30.925, it also implicates this Court's concern with "'arbitrary punishments,' ... that reflect not an 'application of law' but 'a decisionmaker's caprice.'" 127 S.Ct. at 1062 (quotation omitted). The trial court properly rejected it, and the Oregon Supreme Court properly agreed.

2. Defendant's request No. 34 misstated the "profit" factor

The Oregon Supreme Court held that Instruction No. 34 was wrong on the law of punitive damages because it misstated the statutory "profit" factor, as the trial court also ruled. Pet. 20a-21a, App. at 19a. ORS 30.925(2)(c) provides that one of the criteria on which the fact finder is to base its determination and award of punitive damages is "the profitability of the defendant's misconduct." In its request No. 34, Philip Morris asked the court to tell the jury it could base its determination of reprehensibility on "the degree to which the defendant was *motivated* by a desire to obtain *illicit profits* from its misconduct," after reminding the jury that the sale of cigarettes is legal. App. at 2a (emphasis added). The statutory factor is "profitability." It is not "motive to profit," and the addition of the modifier "illicit" is argumentative and legally erroneous. As the trial court ruled, "it doesn't have to be illicit profit. It could be legal profit." App. at 19a. Defendant has never demonstrated or even argued otherwise. The trial court properly rejected defendant's No. 34 for this reason alone. The Oregon Supreme Court properly agreed.

3. The core language on which Philip Morris relies misstates the law

Many of the legal misstatements that infect proposed instruction No. 34 appear in other parts of this long request, but a serious flaw is found in the central language on which defendant relies:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although *you may consider the extent of harm suffered by others in determining what that reasonable relationship is,* you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

App. at 2a-3a (emphasis added).

That distinction is plainly wrong as a matter of this Court's punitive damages jurisprudence. The *BMW* guideposts utilized in evaluating due process excessiveness consider (1) the reprehensibility of defendant's misconduct; (2) proportionality or the reasonable relationship between punitive damages and the actual and potential harm to the plaintiff; and (3) comparable penalties. *BMW v. Gore*, 517 U.S. 559, 560-61 (1996). This Court made clear in this case that harm to others is properly relevant to the first guidepost – reprehensibility. 127 S.Ct. at 1064. That, however, is not what Philip Morris's No. 34

says. The proposed instruction would have made harm to others relevant to the "reasonable relationship" between punitive damages and harm to the plaintiff – the second *BMW* guidepost. This Court also made plain that the only harm to others relevant to deciding the *"reasonable relationship,"* is the harm or potential harm *to the plaintiff.* 127 S.Ct. at 1063. Philip Morris's No. 34, which states just the contrary, was wrong on the central point for which defendant now claims to have offered it.

Indeed, to consider harm to others in deciding the reasonable relationship, or "ratio," would constitute precisely the type of direct punishment for harm to others that this Court found inconsistent with due process, *see* 127 S.Ct. at 1063, because it suggests multiplying the compensatory damages by the number of victims affected by the same misconduct.

Further, Requested Instruction No. 34 erroneously and confusingly suggests that other juries may "award punitive damages for . . . harms" to others than plaintiff. Punitive damages punish for misconduct. Compensation targets harm. Maintaining that distinction, as the trial court did, and as proposed No. 34 failed to do, is crucial to keeping the jury on the right side of the line this Court drew in this case.

Proposed No. 34 was fundamentally wrong on the question of the proper role of harm to non-parties, which has become the central question in this case. That basic error was not some tangential triviality. The trial court was not required to tease that sentence apart, delete its erroneous premise, and revise it to describe the proper distinction laid down

by this Court eight years later.[11] There was no error in denying proposed instruction No. 34.

4. Philip Morris's No. 34 would have encouraged the jury to punish for harm to others

The last sentence of Requested Instruction No. 34 also contradicts this Court's holding in this case. In discussing the relevance of defendant's financial condition[12] to the amount of punitive damages, request No. 34 says:

> Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. . . . [Still,] the paramount consideration remains the degree of reprehensibility of any misconduct and *the extent of any harm caused by such misconduct.*

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11 At oral argument in this Court, Justice Souter called Philip Morris's Requested Instruction No. 34 bothersome and said "I have great difficulty in seeing how I could find that it was error to refuse to give the instruction." App. at 24a, 26a.

12 Before this Court last term, Respondent pointed out the contradictory treatment of the defendant's "financial condition" in Philip Morris's Requested Instruction No. 34 at paragraphs 6 and 11. Respondent's Br. at 48. While Philip Morris responded that they were part of alternate language, they were plainly not alternatives. *See* App. at 3a.

App. at 4a (emphasis added). Mrs. Williams agrees that the reprehensibility of a defendant's misconduct is the most important consideration for the jury in deciding the amount of punitive damages. However, to say that the other "paramount consideration," in addition to reprehensibility, is "the extent of any harm caused" by the misconduct is to suggest the opposite of what this Court held in this case. It would permit the jury to assess punitive damages for "the extent of *any* harm caused by such misconduct. By making harm to others a "paramount consideration" independent of reprehensibility, the rejected instruction would have created a greater risk that the jury might punish defendant "directly for harms it is alleged to have visited on nonparties." 127 S.Ct. at 1064. Permitting that type of direct punishment would squarely violate this Court's holding in this case. The trial court did not err in refusing to give this requested instruction.

5. Requested Instruction No. 34 would have tied the amount of punitive damages to the extent of public knowledge about the risks associated with smoking

Mrs. Williams objected to Requested Instruction No. 34 because it erroneously tied the amount of punitive damages to the extent of public knowledge (in other words, non-parties) about the dangers of smoking. In suggesting that the jury limit any punitive damages "to the extent that the risks from smoking were not a matter of general public knowledge," App. at 2a, Philip Morris sought to introduce an idea that was not only unprecedented and confusing, but wrong in a way that would have contradicted the very idea on which it now relies.

The instruction says, in effect, "You are not to punish defendant because cigarettes are dangerous except to the extent that defendant lied about the danger and the danger was unknown;" that is, "You may punish for harm to others to the extent that the public was misled about the dangers of cigarettes." Thus, proposed No. 34 would have asked the jury to assess punishment to the extent that nonparties were defrauded – or others were harmed. That is exactly what this Court prohibited.[13]

6. The trial court gave Philip Morris's "alternative" request

Proposed No. 34 included four numbered paragraphs purporting to cover the subject of the amount of punitive damages. App. at 3a-4a. The first of these, numbered "(1)," is the part on which Philip Morris focused these appeals. However, immediately following that paragraph, Philip Morris added the headline "[ALTERNATIVE]" above another paragraph "(1)" that read, "(1) You are not to punish the defendant for the impact of its conduct on individuals in other states." App. at 3a. The trial

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13 Further, this part of proposed No. 34 would have allowed punitive damages only on plaintiff's fraud claim. The claim for negligence would also have supported punitive damages, though the jury did not ultimately award punitive damages on that claim. *Williams v. Philip Morris USA, Inc.*, 127 P.3d 1165, 1171 (Or. 2006). There was no legal ground for limiting punitive damages to the fraud claim in instructing the jury as the proposed instruction would have done by limiting punitive damages to punish for risks that were "unlawfully misrepresented by the defendant."

court's instructions to the jury in fact conveyed exactly this principle. Pet. at 164a ("the likelihood at the time that serious harm would arise *in this state* from the defendant's misconduct;" "profitability of the defendant's misconduct *in this state*" (emphasis added). The trial court covered defendant's alternative paragraph (1) in substance and no more was required. *See Hernandez*, 957 P.2d at 151-52 ("There also is no error by the trial court if the substance of the requested jury instruction, even if correct, was covered fully by other jury instructions given by the trial court."). The trial court committed no error.

7. The concerns relied upon by the Oregon Supreme Court are not trivial but further important state interests

While Philip Morris dismissively characterizes the Oregon Supreme Court's ruling as focused on trivialities, Pet. at 25, there is nothing trivial about an insistence on clear and correct jury instructions. The measure for whether a basis for decision is properly adequate and independent, even when firmly established and regularly followed is whether the state practice furthers a "perceivable state interest." *Henry v. Mississippi*, 379 US 443, 447-48 (1965). Philip Morris insists that Oregon has no legitimate interest in insisting that proffered instructions be "'clear and correct in all respects.'" Pet. at 24. Petitioner fails to explain, however, what part of Oregon's well-established "clear-and-correct-in-all-respects" rule it finds objectionable. Does Philip Morris mean to suggest that a state has no legitimate interest in ensuring that proposed instructions be "clear" or "correct?" Or does Philip Morris merely maintain that a state has no

justifiable interest in insisting that instructions not only be "clear and correct" but completely, fully, and wholly correct, *i.e.*, "in all respects?" Certainly, a State's legitimate interest in ensuring that instructions be "clear and correct," may also insist that the instructions be completely correct (and not partially so).

When a party requests a departure from existing or pattern jury instructions, courts understandably scrutinize the proposal closely. Unlike instructions vetted by a lengthy, dispassionate court-approved process or longstanding practice, party submissions cannot be assumed to have been impartially prepared and free of argumentative or biased language. Departure from accepted language risks the need for a new trial or reversal on appeal. Before utilizing a party's new proposal, a court must be satisfied that the proposed instruction does not confuse or mislead the factfinder and remains consistent with the evidence. For that reason, this Court has insisted that instructions, particularly in the realm of punitive damages, be adequate "to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm*, 538 U.S. at 418.

Any rational discussion of an instruction examines it piece by piece. If doing so obligates a court to treat objectionable material piecemeal, as Philip Morris suggests, then the types of informal charge conferences as occurred here will no longer occur or the "clear and correct in all respects" rule will be effectively eliminated. The rule, however, is valid as an allocation not only of the burden of providing correct instructions but also of the risk of

error on appeal. Parties preserve error by separating instruction requests into discrete ideas.

The requirement is not a meaningless ritual designed to trap the unwary. Like the contemporaneous objection rule, Oregon's "clear and correct in all respects" rule "serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Lee*, 534 U.S. at 376-77 (citation omitted). *See also Smith v. Texas*, 127 S.Ct. 1686, 1705 (2007) (Alito, J., dissenting) (explaining that the contemporaneous objection rule serves a well-recognized and legitimate state interest in "avoiding flawed trials and minimizing costly retrials."). A state also has a legitimate interest in allocating to the parties and their counsel the burden of providing trial courts with proposed jury instructions that are complete and correct in all respects. After all, the State has an "important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Osborne*, 495 U.S. at 123. Finally, the requirement serves the State's significant interest in the finality of judgments.

IV. THE PUNITIVE DAMAGES ASSESSED BY THE JURY AND UNANIMOUSLY APPROVED BY THE OREGON COURTS AFTER REPEATED REVIEWS COMPLIES WITH THIS COURT'S DUE PROCESS JURISPRUDENCE

Philip Morris asks this Court to take up the second question presented in its prior application, which this Court chose not to resolve last Term. The question is no more necessary to resolve at this time.

The "conflicts" identified by Philip Morris are insubstantial. Oregon has demonstrated it is fully capable of employing the "ratio" analysis as part of gross excessiveness review, and the punitive damages awarded in this case comport with this Court's jurisprudence.

To claim deep division over the ratio factor, Philip Morris cites two *intermediate state court* decisions that upheld ratios larger than single digits. Pet. at 33-34. Their mere existence in the fact-sensitive inquiry that punitive-damage review involves does not merit a need for this Court's guidance. Philip Morris makes no attempt to evaluate the factual circumstances of the misconduct in the cases it cites. Instead, they advance a theoretical revision of this Court's punitive damage review jurisprudence.

The Court has recently and repeatedly confirmed that "[t]he *most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419, quoting *BMW*, 517 U.S. at 575 (emphasis added). To the contrary, Philip Morris would have this Court treat the "ratio" guidepost as if it were the conclusive and overriding test of excessiveness, leaving reprehensibility to function only within a fixed ratio. In fact, Philip Morris misstates this Court's holdings by arguing that reprehensibility merely establishes where on the continuum of single-digit ratios the punitive damages should be pegged. *See* Pet. at 30 (arguing that this Court has established a range of constitutionally permissible ratios and suggested that the "degree of reprehensibility" (and the amount of compensatory damages) will determine where within that range the constitutional cut-off falls in a

particular case.). This Court has emphatically rejected the exercise in elementary-school mathematics that Philip Morris advances. *See, e.g., State Farm* 538 U.S. at 424-25.

Oregon's courts understand the usefulness and applicability of a ratio analysis. On March 6, 2008, the Oregon Supreme Court reduced a punitive damage verdict from a sixteen to one ratio to four-to-one, finding the original verdict substantially exceeded federal Due Process limits. *Goddard v. Farmers Ins. Co.*, 179 P.3d 645, 666 (Or. 2008). *Goddard* shows the careful approach that the Oregon Supreme Court takes to punitive damage excessiveness.

The fact is that States have different interests that are pursued differently with respect to punitive damages. *See BMW*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). For example, punitive damages substitute for the role other states assign to compensatory damages in wrongful death actions in Alabama. *See Lance, Inc. v. Ramanauskas*, 731 So.2d 1204, 1218 (Ala. 1999). In some states, such as Oregon, the State's interest is expressed by allocating significant portions of a punitive damage award to public purposes. *See, e.g.*, ORS 31.735 (60 percent of any award goes to crime victims fund). In Georgia, punitive damages are capped at $250,000 per plaintiff, unless there is a finding of an intent to harm. *See* Ga. Code § 51-12-5.1(f), (g). Such differences in State treatment of punitive damages

make the purely ratio-based comparison advocated by Philip Morris at odds with Our Federalism.

Philip Morris's proposed elevation of the ratio would contradict this Court's assignment of primary importance to the reprehensibility of defendant's misconduct. If any case can justify a substantial departure from the presumptively valid single-digit ratio, this is that case. Misconduct on this scale is reprehensible in the extreme. It will, one hopes, be vanishingly rare. It deserves rare punishment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

April 23, 2008

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
(202) 944-2874

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
820 SW Second Avenue
Suite 200
Portland, OR 97204
(503) 228-5222

WILLIAM A. GAYLORD
GAYLORD EYERMAN BRADLEY PC
1400 SW Montgomery St.
Portland, OR 97201

(503) 222-3526

CHARLES S. TAUMAN
BENNETT HARTMAN MORRIS &
KAPLAN
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
PO Box 11960
Portland, OR 97211
503-460-2870

Counsel for Respondent
Mayola Williams

**Counsel of Record*

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APPENDIX A

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 34

IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH
PUNITIVE DAMAGES — PRODUCTS LIABILITY

I will now instruct you on punitive damages. If you find that Marlboro cigarettes are a defective product or that the defendant is guilty of negligence or fraud, you must consider whether to award punitive damages.

Punitive damages may be imposed only if the plaintiff has satisfied you by clear and convincing evidence that the defendant, in engaging in the conduct that caused Jesse Williams' death, has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

Clear and convincing evidence is evidence of such weight and quality that, even when considered in light of any conflicting evidence, leaves you with a firm conviction that the truth of the matter in question is highly probable.

You have the discretion to award, or not to award, punitive damages. In the exercise of that discretion, you may consider whether the imposition of punitive damages is necessary to punish and deter similar misconduct by defendant and others in the future.

[P. 2] In considering punitive damages, I remind you that the sale of cigarettes has in itself been at all times a lawful activity in this State. You are not to punish the defendant on account of the propensity of cigarettes to cause illness and death for some of those who smoke them, or the defendant's knowledge of that propensity, except to the extent that the risks from smoking were not a matter of general public knowledge but were known to and unlawfully misrepresented by the defendant.

In determining whether the defendant's conduct is such as to subject it to punitive damages, you must not allow your decision to be influenced by the defendant's financial condition, corporate status, or place of business.

If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring [P. 3] lawsuits of their own in which other juries can resolve their claims and award

punitive damages for those harms, as such other juries see fit.

[ALTERNATIVE]

(1) You are not to punish the defendant for the impact of its conduct on individuals in other states.

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct — that is, how far the defendant has departed from accepted societal norms of conduct.

Factors that you may find to bear upon the degree of reprehensibility include:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct, beyond the harms generally understood to inhere in cigarette smoking;

(b) The degree of the defendants awareness of that likelihood;

(c) The degree to which the defendant was motivated by a desire to obtain illicit profits from its misconduct;

(d) The duration of the misconduct and any concealment of it;

(3) In determining how much punishment is necessary to achieve the goal of appropriate deterrence, you may consider the extent to which the obligation to pay compensatory damages will suffice to cause defendant and others to refrain from similar misconduct in the future.

(4) Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. However, you may not punish the defendant simply because it is large. Rather, the paramount consideration remains the degree of reprehensibility of any misconduct and the extent of any harm caused by such misconduct.

APPENDIX B

[Trial Tr. Vol. 22-C] [Ruling on Defendant's Proposed Jury Instructions and Excerpts of Oral Argument on Jury Instructions in the Circuit Court of the State of Oregon, for the County of Multnomah (Mar. 23, 1999)]

* * *

[Tr. 58] THE COURT: I don't think that's an amount statement.

MR. BEATTIE: I'm not expressing myself very well, Your Honor. I apologize. Let me back up and say if there is a difference between the two, I don't think it is significant, and I would go with the statement in

THE COURT: Okay. Continuing down plaintiff's first -- I would like to go all the way through plaintiffs and then go through defendant's and see what you are offering that isn't here.

MR. BEATTIE: Okay.

THE COURT: Plaintiffs No. 34 then proceeds to set forth the standards by which the jury should determine and assess. Are these the six that are straight out of the statute?

MR. COON: Right. We have omitted the 7th. I think this is intended to be just the statutory language.

THE COURT: Let me look at the statute.

MR. COON: 39.025.

THE COURT: Mr. Beattie, I'm going to read from the statute. If you would like to

* * *

[Tr. 66] MR. BEATTIE: That would be an easier way of thinking of it. Of course, if a defendant comes to this state and harms somebody, all the conduct that resulted elsewhere in the harm here can be considered.

THE COURT: Cigarettes sold in Oregon to the decedent caused him harm --

MR. BEATTIE: Right.

THE COURT: -- as a result of conduct by the decedent out of state. Are you saying that's not punishable?

MR. BEATTIE: That's certainly publishable. What I'm saying is not punishable is other plaintiffs in other states.

THE COURT: I don't disagree we are not here to punish for other plaintiffs' harms. We are here to punish -- if we are here at all to punish, if the jury chooses to punish, it is for the conduct that caused harm to Jesse Williams on or after September 1, 1988, right?

MR. BEATTIE: Right.

* * *

[Tr. 68] consider the harm caused elsewhere?

Mr. COON: The Oregon statute says you can consider the likelihood that serious harm would

arise, profitability, degree of the awareness, duration of misconduct.

It is just not the duration of the misconduct that caused harm to Jesse Williams. It is the duration of the misconduct that caused harm to other people. We should be clear, there is harm to other folks, and then there is harm to other folks outside Oregon.

I don't think maybe the defendants are arguing harm to other people in Oregon, I think they are arguing about what might have happened to people outside of Oregon.

THE COURT: What part of your 34, Mr. Beattie, is directed to this Gore v. BMW?

MR. BEATTIE: Much of it, Your Honor.

THE COURT: Tell me where to look.

MR. BEATTIE: This one aspect is addressed on Page 3 at Lines 1 through 6, carrying over from Page 2. But most importantly at 5 and 6 where I have alternative highlighted, "You are not to punish the defendant for the impact of its conduct on individuals in other [Tr. 69] states" and that works into reviewing plaintiff's requested jury instructions states the statutory standards.

On No. 1, "The Likelihood" -- and I'm reading from the bottom of Instruction No. 34 on the first page. "The likelihood at the time that serious harm would arise from Defendant's misconduct." For it to meet the constitutional requirements, it should say, "The likelihood at the time the serious harm would arise in this state for defendant's misconduct."

On 3, "The profitability of defendant's misconduct in this state." Both of those, 1 and 3, have to be state-specific under BMW v. Gore. Otherwise, you would be punishing them for harms to other people outside of Oregon that may not be punishable in those states.

THE COURT: Okay. So you are suggesting that Elements 1 and 3 need the modifier "in this state." What else needs to be done to the statutory elements under your version of the constitutional requirements?

MR. BEATTIE: I think that the elements also have to have something in them that instructs the jury that there should be a [Tr. 70] reasonable relationship between the harm caused to Jesse Williams, the amount awarded plaintiff, and the amount of punitive damages. This is at the bottom of Page 2.

THE COURT: What's the origin of that argument in terms of authority?

MR. BEATTIE: This is another Gore v. BMW. And I have to confess this is generally addressed post-judgment -- post-verdict, at least, in determining whether the amount of punitive damages is constitutionally excessive.

But the cases also state that the same factors that the Court considers in determining whether punitive damages award is constitutionally excessive are or can be the same factors considered by the jury in calculating the award in the first place.

THE COURT: Maybe I'm being too pragmatic here, but don't we have punitive damage instructions that have survived scrutiny post-whatever --

MR. COON: Post-Oberg, we have.

THE COURT: -- in Oregon, that would give me some assurance that I'm not just following a statute blindly, but meeting the constitutional [Tr. 71] issues that have been addressed and resolved by our appellate courts?

MR. COON: We don't have -- Gore is a '96 case and --

THE COURT: Gore is from Alabama, U.S. Supreme Court, constitutionality issues. I was hoping we could start first by addressing our Oregon Constitution. What we have got here is that our appellate courts have already said is okay before we --

MR. COON: This is an issue, as the Court probably knows, through Oberg, it is something that Oregon courts have done with their own statute, which was then amended in 1995. And it turns out not to be an Oregon constitutional thing, because there is no due process clause in the Oregon Constitution.

THE COURT: And you had to come here, Mr. Randles.

MR. COON: Without due process. It gets right to the Supreme Court.

THE COURT: Never mind.

MR. COON: One thing that Jay says is important. Many things are important, but one I noticed was that this -- these factors, these [Tr. 72] four factors

are ones that the Court in Gore apparently, and 159a according to Parrott v. Carr Chevrolet, the Court of Appeals applied post-judgment, or maybe the trial Court applies post-verdict.

So this question of proportionality -- one of the other factors is what are the other penalties out there and how does this stack up for any criminal penalties for this conduct that might exist, a factor that I'm not sure that anyone can coherently argue is good grist for jury instruction. That's one of the three Gore factors. One is proportionality, how big is this compared to damages, and one is reprehensibility to the conduct.

THE COURT: Let me stop first and go back to the proportionality point you're making. Is there case law that says that the trial Court shall, in order to have a constitutional instruction, tell the jury about proportionality?

MR. BEATTIE: It has always been addressed post-verdict.

THE COURT: That's where I'm going to address it then. Unless you can show me that [Tr. 73] there is authority that I have to do it for the jury, why wander where no judge has been told to go before?

MR. BEATTIE: I think it is an accurate statement of the law and in the instruction. I certainly understand your view.

THE COURT: I am just trying to be safe. If there is no case law that says I need to do it to be constitutional, and if there is a punitive award, it is a standard I have to evaluate with guidance and briefing from both sides, obviously, I will do that.

Unless it is required for the jury, they have got plenty to consider. So that would be your Element 1 on page 2, Mr. Beattie; is that right?

MR. BEATTIE: That has to do with proportionality. It also has a second prong. It says, "You may consider the extent of harm suffered by others in determining what the reasonable relationship is. You are not to punish the defendant for the impact of its alleged misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claims and award [Tr. 74] punitive damages for those harms."

This is sort of a State ex rel Crookham sort of rush-to-the-courthouse issue where the defendant is simply trying to make sure, on one hand, that the first person in line doesn't get all of the damages to the exclusion of everybody else. But then, on the other hand, wants to make sure that the defendant is not being punished in this case for alleged harms that other persons can recover for in their own right.

So to the extent in this case they are claiming we should be punished because other persons have been harmed, and you should take into consideration those particular harms, that's not for the jury to consider because those persons themselves can recover.

THE COURT: But the goal of punitive damages is punishment and deterrence in the future; punishment for past misconduct of the defendant and deterring conduct that will hurt those other potential litigants in the future, too, so it is not necessarily resolvable that way.

MR. COON: I guess the way I would [Tr. 75] respond to that, the seven factors in the statute the Legislature had said, "These are the factors, and No. 7 is how much you have paid other people." So what the Legislature has said is we should look back and see, had this defendant been tagged by other juries for other punitive damage amounts? But it does not say other amounts that might be awarded in the future. And the Legislature --

THE COURT: Well, I know that statute doesn't say that. What I am trying to give due consideration to is whether there is a constitutional standard that I'm obliged to invoke here for the jury's consideration in terms of what they are considering.

It seems to me that, first of all, our Legislature has considered total deterring effect and other punishments. And where there is evidence about that, obviously the jury needs to be instructed on.

In this case, unlike -- for example, like the Purcell case, we did have a defendant which had been the subject of other punitive damage awards and chose to litigate that, brought in [Tr. 76] evidence that we had been punished enough and argued to the jury we have been punished enough, and the result was what the result was, and maybe that helped. We don't know, in the end, whether that made the jury go up or down.

But in terms of instructing the jury that when they punish, they shouldn't be compensating for other claimants who haven't yet come to court, to me, that is addressed in part because we are first — we have already told the jury that punitive damages are not compensatory damages.

I would maybe say -- instead of saying "intended to compensate plaintiff," I might say "compensatory damages." They are not compensatory. They are punitive. They are designed to punish and deter and, therefore, they are not designed to compensate for other plaintiffs who aren't here, and they are not designed to compensate this plaintiff. They are designed to punish and deter.

So I guess what I'm saying, this seems repetitive to me in that regard, the second half of your Item 1 at the bottom of page 2.

MR. BEATTIE: Well, it really isn't. [Tr. 77] What we're saying in that paragraph, you shouldn't punish us for harms to other persons who can bring their own claims for punitive damages and not compensatory damages per se.

So in calculating the amount of punitive damages under the statute -- and let me be candid at this point here. I understand that you are bound by the statute at this point. I suppose you could declare the statute unconstitutional at some level, but under the Oregon statute that is in the proposed jury instruction the plaintiff has proffered, this element is not there.

THE COURT: Is there case law that says this element has to be there for the jury?

MR. BEATTIE: Not directly, no. It is another one of the considerations that the Court looked at in the BMW case and a number of others.

THE COURT: I think the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one -

- if you want to maybe introduce "compensate plaintiff or anyone else for damages caused by defendant's conduct," [Tr. 78] if that gets you where you need to be. They are designed to punish and deter.

MR. BEATTIE: Okay.

THE COURT: Do you want to introduce the phrase "or anyone else," -- "compensate plaintiff or anyone else," or are you satisfied with "plaintiff" alone there?

MR. BEATTIE: I would go with the phrase "or anyone else."

THE COURT: Is there error with that?

MR. COON: No error.

THE COURT: So I think I have satisfactorily worked my way through your Element No.1. What other parts of your instruction --

MR. BEATTIE: I'm sorry to keep going backwards.

THE COURT: Hold on. Mr. Randles wants to jump in.

MR. RANDLES: Did we resolve the other states question?

THE COURT: No, we haven't. I have written it in parenthesis yet. I am trying to work myself through all the other pieces and see what is missing and what I am obliged to give [Tr. 79] them.

MR. BEATTIE: The top two paragraphs of Page 2 we didn't address. The first paragraph is not part of any constitutional requirement. It is really common

sense that the jury cannot punish defendant for selling a product that causes illness or injury that people are aware of when they purchase the product. This actually goes to the element of the statute that plaintiff must prove -- let's see if I can quote from the statute -- that defendant has shown a reckless and outrageous indifference to a highly unreasonable risk of harm. As we previously briefed to the Court, you don't create a highly unreasonable risk of harm when you sell to a person a product that the person and the seller both know causes certain injuries.

THE COURT: Your Paragraph 1 on Page 2 is closing argument and given by the Court would be a comment on the evidence. I won't give Lines 1 through 8. Go on.

MR. BEATTIE: 9 is perhaps subject to the [Tr. 80] same infirmity. It is simply an admonition to the jury not to consider awarding punitive damages because defendant is a corporation, because it has substantial financial resources, or because it happens to be from out of state.

THE COURT: Well, this is more like the old "every person is equal before the law" general instruction that sometimes when asked is given upfront, that all persons are equal before the law. If you want an "all persons are equal before the law" instruction, write one up, I will consider giving it upfront. That's where it usually came as part of the precautionaries. You can insert it by "without bias, sympathy or prejudice, without regard to the plaintiff's status as individuals and families, and without regard to the defendant's status as an out-of-state corporation." If that's the concept that you want an instruction on, that's the place to put it. Here, it would be a

comment, so I won't give it here, but I will consider it as a separate insert to the precautionaries.

MR. BEATTIE: That would be good, Your [Tr. 81] Honor.

THE COURT: Next, Lines 13 through 19. This is your language that you prefer instead of, "The amount of punitive damages, if any, shall be determined and assessed based on the following." You want: "If you determine that some amount of punitive damages should be imposed, it will then be your task to set an amount that is appropriate; such amount as you believe is necessary to achieve the objectives."

MR. BEATTIE: Uh-huh.

THE COURT: I think saying, "The amount of punitive damages, if any, shall be determined and assessed based upon the following," which comes after a statement, "In order for you to assess punitive damages, plaintiff must show by clear and convincing evidence the standard," and it comes after the statement -- actually, it comes before the statement, "then punitive damages are assessed to punish defendant and deter misconduct." This is more words to say the same thing, and I believe the point is adequately conveyed. There is nothing new there in Lines 13 through [Tr. 82] 19. Moving to Page 3.

MR. BEATTIE: We talked about --

THE COURT: Let's talk about the other states part.

Mr. Coon, the defendant is proposing, unless I add a modifier "in this state" to Elements 1 and 3,

the instruction is constitutionally infirm. Do you want to run that risk?

MR. COON: I have to admit I'm a little scared of that, too. I will go along with "in this state."

THE COURT: Item 1, "The likelihood at the time that serious harm would arise in this state from defendant's misconduct." Item 3, "The profitability of the defendant's misconduct in this state." Moving on to then to Element 2 on Page 3 of defendant's 34.

MR. RANDLES: Your Honor, I don't know, I would like to request that Mr. Coon make sure the guys making the closings understand that limitation, because arguing it would be occurring the same error, even if it is not [Tr. 83] consistent with the instructions.

THE COURT: I hold every one of those trial lawyers accountable. They have not done this work. You all have been patient and worked line-by-line. If they don't get it, they should expect me to come down on them in the jury's presence. You need to brief your teams, both sides.

MR. BEATTIE: I have mine here.

THE COURT: Well, you need to brief the person who is going to be speaking to the jury, and maybe we can catch their attention before they adjourn tonight sometime. I have a feeling we will be here as long as they are.

MR. BEATTIE: We are nearing the end, Your Honor.

THE COURT: Go ahead. We are on Page 34 -- No. 34, Page 3, Line 7. What's new here?

MR. BEATTIE: What's new is simply the way in which the statutory factors are analyzed under the constitutional standard. Basically, they hit our statutory factors, or reasonable facsimiles thereof, under the rubric of determining what punishment is necessary to punish defendant based on the degree of [Tr. 84] reprehensibility of defendant's conduct. So basically my A, B, C and D under (2) are identical to the statutory factors.

MR. COON: Illicit profits.

MR. BEATTIE: The illicit profits that I discuss in (C), as well as in (A) talking about the harm caused by defendant's misconduct are tied to the fact that cigarettes can be lawfully sold. It is reasonable to take a profit from a proper product. Defendant's misconduct must be something more than simply selling a product that everybody understands is capable of causing injury. It is not the sort of thing that you can punish somebody for selling a knife or selling something that is capable of causing injury. So I'm trying to separate the fact of injury from the fact of bad conduct, because otherwise they could just go, under (4) in plaintiff's instruction -- excuse me -- I don't mean (4). I mean (1) and (2), the likelihood at the time that the serious harm would arise from defendant's misconduct and degree of defendant's awareness of that likelihood, the jury could [Tr. 85] take into consideration that the defendant sells cigarettes all the time, knowing that some harm could come from smoking cigarettes.

THE COURT: It is not "some harm" that is actionable. It is harm that is negligently caused or harm that is the result of misrepresentation. You won the point that punitive damages have to arise from the defendant's conduct which is causally connected to the claim for relief, and that's covered. I don't see anything on Page 3 or 4 that isn't argumentative-counsel material, commentary on the evidence by the Court, and I think all of the points you make your lawyers can argue, if they want to. I'm not telling the jury that it is an illicit profit. That's not part of the statute. And it doesn't have to be illicit profit. It could be legal profit. But it arises from reprehensive conduct that meets the constitutional standards, clear and convincing proof, that whole string of words -- the profits could be legal, but they are perfectly sufficient to be a basis for punitive damages. So I wouldn't suggest that your trial [Tr. 86] lawyers use the word "illicit" in the jury's presence, but these concepts can be argued. I decline to give the rest of your No. 34.

MR. BEATTIE: Thank you, Your Honor. I can work out with Mr. Coon basically a modification of his,

THE COURT: Let me review what I have now for plaintiff's 34, and what I would like to see redrafted, just to summarize.

In Paragraph 1, three claims is reduced to two.

In Paragraph 2, the defendant's causation element needs to be worked in.

Then we move up as a new Paragraph 3, the two lines, "If you decide that the defendant has acted," and we insert in that "discretion to assess or not to assess."

Then we go to "Punitive damages are assessed against a defendant to punish misconduct and deter misconduct." And then we have added to the next sentence the phrase "or anyone else" after the word "plaintiff." We have stricken the rest of that paragraph.

And then the next section reads, "The amount of punitive damages, if any, shall be [Tr. 87] determined and based upon the following: The likelihood at the time that serious harm would arise in this state from the defendant's misconduct." And the only other change is "the profitability of the defendant's misconduct in this state." That takes care of plaintiff's 34.

MR. BEATTIE: By the way, it was understood that we were going to cross out the $100 million figure in their instruction.

THE COURT: What do you mean "it was understood"?

MR. BEATTIE: When we previously discussed the jury instructions, you said the amounts claimed would be stated --

THE COURT: On the verdict form.

MR. BEATTIE: Okay.

THE COURT: I was being asked whether I was going to write the numbers on the verdict form, and I said no, it comes in the jury instruction on damages.

On the noneconomic damage, there is a line that says the line may not exceed one million. In this

case, there is an upper limit by law. It is what they prayed for, and it is

* * *

APPENDIX C

[Trial Tr. Vol. 23-A] [Excerpts of Plaintiff's Closing Argument in the Circuit Court of the State of Oregon, for the County of Multnomah (March 24, 1999)]

* * *

[TR. 111] PLAINTIFF'S CLOSING ARGUMENT

* * *

MR. GAYLORD: May it please the Court, Mrs. Williams, opposing counsel, ladies and gentlemen of the jury. As you can see, we have altered the courtroom a little bit for this part of the proceeding. I feel like we shrunk the back part and enlarged the front part. And it's for no particular reason other than we are going to be addressing this whole part of the presentation directly to you, and it seems a little freer to move around this way. I did bring back out this exhibit that we started off with in the opening statements. I would suggest that you not be too anxious about how well you can see it or whether you can see it. I really didn't make use of it during the trial. And I'll be honest with you. I was sort

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APPENDIX D

[Trial Tr. Vol. 25] [Excerpts of Jury Instructions in the Circuit Court of the State of Oregon, for the County of Multnomah (March 26, 1999)]

* * *

[TR. 64] THE COURT: Any other exceptions for plaintiff?

MR. COON: No other exceptions. Thank you, Your Honor.

THE COURT: Mr. Beattie.

MR. BEATTIE: For the defendant and for the record, I understand the Court's rulings on these, and I do not request further argument. Defendant objects to the Court's failure to give proposed instruction No. 39, which was the duty of a manufacturer of an unavoidably dangerous products, and objects to the giving of instruction 13 on common law negligence, without such an instruction of the manufacturer's duty where the manufacturer makes a product that is unavoidably dangerous. We also take exception to the Court's failure to give Defendant's 34 on punitive damages, and take exception to the giving of Plaintiff's 34 on punitive damages, to the extent it misstates the constitutional standard set forth in Gore vs. BMW.

THE COURT: Thank you.

* * *

APPENDIX E

[Excerpts from the Transcript of Proceedings in the United States Supreme Court (October 31, 2006)]

* * *

[Tr. 5] To consider the conduct means to evaluate it in connection with assessing the blameworthiness of the conduct being punished.

JUSTICE SOUTER: Isn't that the problem? If the instruction had said that, you would have a very different instruction, and I'm bothered by the instruction too for just that reason. It says you may consider, and if I were a juror parsing the instruction, I would say why. You've just told me I'm not supposed to punish them.

MR. FREY: Well, the second part of it is, what punishment means is what would be done in a class action, for instance, to impose punishment for all the harm suffered by Oregon smokers.

JUSTICE SOUTER: Okay. This is an argument that you're making to us, but I don't know how a juror is supposed to figure this out.

MR. FREY: Well, let me say a couple of things about that. First of all, the Oregon Supreme Court did not rely on this aspect. It held that it was [Tr. 6] proper to punish for harm to nonparties. Now this, in our view, this instruction, and there's always a danger when you add words to an instruction that you will add something that a court will find was incorrect

and therefore deny the instruction, even though the essence of it was correct.

JUSTICE GINSBURG: Where did the Oregon Supreme Court say it was proper to punish the harm to nonparties? Your brief quotes something to that effect, but -- the sentence is on page 18(a) of the appendix to the petition. It says, what the Oregon court said is, Philip Morris asserts that Campbell prohibits the state acting through a civil jury from using punitive damages to punish a defendant for harm to nonparties. The Oregon Supreme Court on its own, I think, didn't put it in terms of harming particular nonparties, but to exposing Oregon residents to the risk of a deadly disease.

MR. FREY: Well, I would refer the Court to pages 20(a) to 21(a) of the appendix, where the court discusses, comes to its conclusion on this point. And it says, the instruction would prohibit the jury from punishing the defendant for the impact of its alleged conduct on other persons even if those persons were Oregonians who were harmed. But on 28(a) it says, [Tr. 7] because the proposed verdict did not accurately reflect the law, this is not a statement about Philip Morris's position, the trial court did not commit reversible error when it refused to give it. So I think the court was quite clear in saying -- let me complete my answer, because I think considering it moves the needle along the scale of allowable punishment for the harm to Jesse Williams, but it does not abandon the principle of proportionality to that harm, whereas punishing for it is what you would do in a class action. You would punish for all the harms to all the Oregonians. This is a one-way class action in which Philip Morris was exposed to

global punishment by the jury without any of the protections of a class action. So --

JUSTICE SOUTER: Let me -- let me -- let me focus on the problem that I have right now this way. If I look at the Oregon Supreme Court opinion, and particularly at the point that you mention in 20 and 21, I have to say I, I read the opinion the way you read the opinior.. I read them the same, just what you claimed they were saying. The difficulty that I have is because I think the instruction that was proposed on behalf of your client was not a clear instruction, I have great difficulty in seeing how I could find that it was error to refuse to give the instruction.

* * *

APPENDIX F

Oregon Cases Applying Clear and Correct in all Respects Doctrine

Bennett v. Farmers Ins. Co., 26 P.3d 785, 795 (Or. 2001) ("failure to give a *requested* instruction is not error if the requested instruction is not correct in all respects").

State v. Reyes-Camarena, 7 P.3d 522, 528 (Or. 2000) (no error in declining instruction that "did not state the law correctly in all respects . . . regardless of whether that instruction was correct in part").

Coulter Prop'ty Mgmt v. James, 970 P.2d 209, 215 (Or. 1998) (no error if "requested instruction is not correct in all respects").

Hernandez v. Barbo Mach. Co., 957 P.2d 147, 151 (Or. 1998); *Simpson v. Sisters of Charity of Providence*, 588 P.2d 4, 13 (Or. 1978) (requested instruction that "contained objectionable language" properly rejected).

Beglau v. Albertus, 536 P.2d 1251, 1256 (Or. 1975); *Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972) ("trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors.").

Dacus v. Miller, 479 P.2d 229, 232 (Or. 1971) ("trial court will be upheld in refusing to give a technically incorrect instruction even though, after mature consideration, an appellate court might conclude that the giving of the instruction would not have constituted reversible error").

State v. North, 390 P.2d 637, 639 (Or. 1964), *cert. denied*, 379 U.S. 939 (same).

Stanich v. Buckley, 368 P.2d 618, 620 (Or. 1962).

Wiebe v. Seely, 335 P.2d 379, 393 (Or. 1959) ("[I]t is well settled that if a requested instruction is not altogether free from fault, the court need not give it.").

Mason v. Allen, 195 P.2d 717, 722 (Or. 1948).

Hotelling v. Walther, 148 P.2d 933, 935-936 (Or. 1944).

Morris v. Fitzwater, 210 P.2d 104, 108 (Or. 1941).

State v. Quartier, 247 P. 783, 783-784 (Or. 1926) ("requested instruction is always properly refused, unless it ought to have been given in the very terms in which it was proposed.").

Hooning v. Henry, 213 P. 139, 141 (Or. 1923).

Sorenson v. Kribs, 161 P. 405 (Or. 1916).

Moe v. Eugene Zurbrugg Constr. Co., 123 P.3d 338, 345 (Or. Ct. App. 2005) (no error to decline instruction if it "is not correct in all respects").

Roop v. Parker Northwest Paving Co., 94 P.3d 885, 903-04 (Or. Ct. App. 2004).

Leiseth v. Fred Meyer, 57 P.3d 914, 916 (Or. Ct. App. 2002).

Summers v. Binns, 10 P.3d 294, 297 (Or. Ct. App. 2000).

APPENDIX G

State Cases Applying Clear and Correct in all Respects Doctrine

Arizona – *Public Service Co. of Oklahoma v. Bleak*, 656 P.2d 600 (Ariz. 1982) (if requested instruction is partly correct and partly incorrect, it is not the duty of the trial court to "separate the sheep from the goats," and the entire instruction may be properly refused).

Arkansas – *Smith v. Stevens,* 855 S.W.2d 323 (Ark. 1993); *Western Union Tele. Co v. Ford,* 92 S.W. 528 (Ark. 1906).

California – *Roberts v. City of Los Angeles,* 167 Cal. Rptr. 320 (Ct. App. 1980).

Colorado – *Denver & R.G.R. Co. v. Peterson,* 69 P. 578 (Colo. 1902).

Georgia – *Department of Transp. v. 15.172 Acres of Land,* No. A07A1842, 2008 WL 682597 (Ga. Ct. App. Mar. 14, 2008).

Indiana – *Lazarus Dept. Store v. Sutherlin,* 544 N.E.2d 513 (Ind. App. 1989).

Louisiana – *Barrois v. Service Drayage Co.*, 250 So. 2d 135 (La. App. 1971).

Michigan – *Duncan v. Strating,* 99 N.W.2d 559 (Mich. 1959).

Missouri – *Hertz v. McDowell,* 214 S.W.2d 546 (Mo. 1948); *Albert v. United Rys. Co. of St. Louis,* 232 S.W. 793, 795 (Mo. App. 1921).

Montana – *Dorall v. Davis,* 360 P.2d 409 (Mont. 1961).

North Dakota – *Wrangham v. Tebelius*, 231 N.W.2d 753 (N.D. 1975).

Ohio – *Lewis v. Woodland*, 140 N.E.2d 322 (Ohio App. 1955).

Texas – *Downen v. Texas Gulf Shrimp Co.*, 846 S.W.2d 506 (Tex. App. 1993).

Utah – *Godesky v. Provo City Corp.*, 690 P.2d 541 (Utah 1984).

Virginia – *Honsinger v. Egan*, 585 S.E.2d 597 (Va. 2003).

Washington – *Crossen v. Skagit County*, 669 P.2d 1244 (Wash. 1983).

REPLY BRIEF

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No. 07-1216

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Oregon

PETITIONER'S REPLY BRIEF

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer Brown LLP
1675 Broadway
New York, NY 10022
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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PETITIONER'S REPLY BRIEF

Respondent's brief fails to come to grips with the fundamental errors that warrant this Court's review. At trial, Philip Morris requested that the jury be instructed not to impose punishment for harm to persons who were not parties to the litigation. The trial court addressed that clear and straightforward request separately from the rest of Philip Morris's proposed charge and rejected it on the merits, reasoning that due process does not require such an instruction. The Oregon appellate courts upheld that decision, also on the merits. This Court disagreed, holding that, "upon request," a party is entitled to "*some* form of protection" against the risk of punishment for harms to non-parties. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007). The Court explicitly stated that "the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal," and remanded for the state court to "apply" the correct standard. *Ibid.*

The Oregon Supreme Court refused to do so. Instead, it found (for the first time in nine years of appellate litigation) that supposed errors of state law in "unrelated" portions of the proposed charge – errors that indisputably had no impact on the trial court's refusal to instruct the jury on harm to non-parties – barred consideration of petitioner's federal claim. Pet. App. 15a. Respondent's arguments in defense of that ruling ignore the plain language of this Court's mandate; disregard the course of the proceedings below; and provide a roadmap for state courts seeking to frustrate the invocation of federal rights.

I. THIS COURT SHOULD ORDER THE OREGON SUPREME COURT TO APPLY THE STANDARD SET FORTH IN *WILLIAMS*.

A. The Oregon Supreme Court Defied This Court's Directive.

This Court remanded with the unambiguous instruction "to apply the [constitutional] standard we have set forth." 127 S. Ct. at 1065. The Oregon Supreme Court declined to do so. Instead, it found that there was a "preliminary, independent *state law standard* that we must consider, *before we address the constitutional standard* that the United States Supreme Court has articulated." Pet. App. 13a (emphasis added). The Oregon court then explained that "[a] state law decision * * * may be affirmed, *without reaching the federal question*, if there is an independent and adequate state ground for doing so. * * * We believe that this is such a case * * *." *Ibid.* (emphasis added).

In the face of this clear language, respondent asserts that the Oregon Supreme Court "faithfully applied" this Court's constitutional standard on remand by finding that petitioner's "request" was inadequate. Opp. 10, 11-12, 14, 25. Respondent's attempt to shoehorn the Oregon court's decision into seeming compliance with this Court's mandate fails, for two reasons.

First, contrary to her strident rhetoric (Opp. 11, 12, 13), it is respondent who mischaracterizes the Oregon Supreme Court's decision. This Court's directive was to "apply" the substantive "constitutional standard" – the prohibition on punishment for harms to non-parties. The Oregon court refused, however, to "address the constitutional standard" at all, Pet.

App. 13a, much less to do so "faithfully." Opp. 13. Instead, the court found that because Requested Instruction No. 34 was "erroneous in a number of ways that are *unrelated to the issues addressed by the United States Supreme Court*," Pet. App. 15a (emphasis added), the submission of that instruction failed to preserve Philip Morris's constitutional claim *as a matter of state law. Ibid.* The Oregon Supreme Court thus sidestepped the constitutional standard.

Second, the Oregon court did not find, and could not have found, that Philip Morris's "request" for protection of its constitutional rights was inadequate as a matter of federal law. Respondent does not dispute that this is a question of federal law and that "the assertion of Federal rights, when plainly and reasonably made," cannot be defeated by "local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). The federal right at issue is the right to have the trial court, "upon request," provide "*some* form of protection" against the risk of jury confusion and the possibility of unconstitutional punishment. See *Williams*, 127 S. Ct. at 1065.

It is beyond dispute that this case involves a request "plainly and reasonably made." Philip Morris tendered a clear, straightforward, and accurate request for protection against the risk of unconstitutional punishment for non-party harms.[1] The trial

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[1] Reprising her prior, unsuccessful arguments to this Court, respondent asserts that Requested Instruction No. 34 misstated the federal standard. Opp. 25, 27-29. The Oregon Supreme Court made no such finding; to the contrary, it assumed that the relevant portion of the instruction "clearly and correctly articulated the standard required by due process." Pet. App. 12a. More importantly, *this* Court explained that the proposed instruction accurately stated due process requirements by prop-

court (and subsequently the Oregon appellate courts) addressed that request separately from other components of the proposed punitive damages instruction and rejected it on the merits.[2] The fact that the request was part of a proposed instruction that allegedly contained errors of state law on "unrelated" subjects does not obviate the fact that an appropriate request was made – and made unequivocally. That request was sufficient to trigger Philip Morris's due process right to protection from unconstitutional punishment.

B. Respondent Offers No Justification For The Imposition Of A State-Law Bar After This Court's Ruling On The Merits Of The Federal Claim.

In defense of the Oregon Supreme Court's decision to interpose a state-law procedural bar for the first time on remand from this Court, respondent insists that the Oregon courts have discretion to depart from their "usual practice of considering state

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erly "distinguish[ing] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Williams*, 127 S. Ct. at 1064. Cf. *United States* v. *Williams*, 504 U.S. 36, 40 (1992) (when the Court reaches the merits of a federal claim, in the face of respondent's assertions that the claim was not properly presented, this Court "necessarily considered and rejected" those assertions).

[2] Respondent's new assertion (Opp. 8-9) that Philip Morris failed to preserve its constitutional argument in the Oregon Court of Appeals and the Oregon Supreme Court is completely undermined by the fact that the state appellate courts and this Court reached its merits *five* times in this litigation. See Pet. App. 161a-162a (charge conference); 140a (Oregon Court of Appeal); 102a-105a (Oregon Court of Appeal on remand); 8a (Oregon Supreme Court); *Williams*, 127 S. Ct. at 1065.

grounds before addressing federal issues." Opp. 17. Even if the Oregon courts can depart from their customary decisional hierarchy – and respondent cites no precedent for such action[3] – that does not mean it is permissible for the Oregon Supreme Court to turn this Court's grant of review and decision on the merits into a meaningless exercise. *Michigan* v. *Long*, 463 U.S. 1032 (1983), put state courts on notice that if they decide a federal issue, this Court will conclude that there was no independent and adequate state ground that could support the same judgment. Pet. 16-17. That rule would make no sense if the state courts were free on remand to find, belatedly, a state procedural ground that effectively renders this Court's ruling a nullity. Respondent is silent on this point.

Respondent's reliance upon a 1982 Vermont decision and a 1971 New Jersey case for the proposition that "other state courts have addressed federal constitutional concerns first," Opp. 18, is misplaced: in neither case did the state court invoke the state-law ground after a remand from this Court on the federal claim. Indeed, in *Vermont* v. *Badger*, 450 A.2d 336 (Vt. 1982), the court specifically stated that state-law issues should be addressed *before* a case goes to this

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[3] Ignoring the substantial body of Oregon case law setting forth the decisional hierarchy, respondent cites one case in which an Oregon court addressed a federal law challenge to a prison procedure prior to addressing a state law challenge. Opp. 18 n.6. This ordering of distinct issues within a single opinion hardly suggests that a court may reject a federal claim on the merits and then, on remand from this Court, hold for the first time that the federal issue was unpreserved. See also Pet. 19 n.7 (distinguishing cases where state substantive law affords *broader* protection than federal law).

Court: "Fulfillment of this Court's responsibilities as a member of the federalist system requires us to consider the availability of state grounds *before* federal appeal." *Id.* at 347 (emphasis added). See also *Avdel Corp.* v. *Mecure*, 277 A.2d 207 (N.J. 1971) (cited at Opp. 18) ("look[ing] first to the decisions of the United States Supreme Court" only because state statute would "allow out-of-state service to the uttermost limits permitted by the United States Constitution").

In sum, respondent fails to cite *any* authority in support of the Oregon Supreme Court's decision to invoke a state-law bar to Philip Morris's federal claim for the first time on remand from this Court. Nor does she explain why the lower courts should be permitted to waste this Court's resources in such a manner.

C. The State-Law Ground Invoked Below Is Not An Independent And Adequate Basis For The Judgment.

The decision below fails for a third reason: the procedural rule on which it rests is anything but "firmly established and regularly followed," and therefore is not adequate as a matter of federal law to bar Philip Morris's federal claim. See Pet. 25-29. At oral argument on remand, the Oregon Supreme Court justice who ultimately wrote the opinion signaled the court's apparent willingness to manipulate state procedural rules, proclaiming that this Court "assumes we're proceeding in good faith" and therefore "wouldn't care for one second" if the Oregon court departed from its procedural precedents. Pet. App. 181a.

And depart it did. Respondent spends many pages demonstrating that the "correct in all respects" rubric has been part of Oregon practice for decades – as we recognized in the petition. See Pet. 27. But the deciding question is not whether such a rule exists in Oregon, but whether the rule's peculiar application here was established and foreseeable at the time the instruction was proposed. Respondent fails to cite to a single case in which an Oregon court has invoked the "correct in all respects" requirement as the basis for rejecting an instruction on one subject (separately considered and ruled upon by the trial court) merely because it appeared under the same heading as a defective instruction *on an entirely separate point of law*. Not one of the cases cited at Opp. 21-23 stands for the proposition she asserts: that it is permissible to refuse a valid instruction because some unrelated part of the proposed charge is invalid.[4]

Harvey v. *Tyler*, 69 U.S. 328 (1864) (cited at Opp. 21) is especially inapposite: there, the trial court denied a series of requested instructions, even though

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[4] See *Simpson* v. *Sisters of Charity*, 588 P.2d 4, 13 (Or. 1978) (requested instruction covered a single topic); *McCaffrey* v. *Glendale Acres, Inc.*, 440 P.2d 219, 222 (Or. 1968) (same); *Roop* v. *Parker Nw. Paving Co.*, 94 P.3d 885, 903-904 (Or. Ct. App. 2004) (same); *Dacus* v. *Miller*, 479 P.2d 229, 232 (Or. 1971) (en banc) (requested instruction was confusing in its entirety); *Begiau* v. *Albertus*, 536 P.2d 1251 (Or. 1975) (en banc) (general, oral request for an instruction without proposed language did not preserve claim); *Brigham* v. *S. Pac. Co.*, 390 P.2d 669 (Or. 1964) (en banc) (party waived claim by failing to specify the particular language in the court's charge that it found objectionable); *Hooning* v. *Henry*, 213 P. 139 (Or. 1923) (court is not required to give a limiting instruction entirely different from the one requested).

some were proper. This Court upheld the denial not for the formalistic reason that the instructions were requested as part of a series, but rather because counsel had failed to call to the court's attention the need for an instruction on the specific point of law at issue. See *id.* at 339. See also *Beaver* v. *Taylor*, 93 U.S. 46, 54 (1876) (cited at Opp. 21) (same). *Harvey*'s requirements were satisfied here: when the trial judge went through the proposed instruction line by line, defense counsel called particular attention to the need to instruct the jury not to punish for harm to non-parties, and the trial judge made a separate ruling rejecting that specific point. Pet. App. 6a, 16a, 156a-162a.[5]

Nor is respondent's argument bolstered by her bizarre claim that "the Oregon courts, in this very matter, had repeatedly asserted the venerable 'clear and correct in all respects' requirement." See Opp. 3-4 (citing Pet. App. 140a, 52a); Opp. 16. In both of those earlier instances, the Oregon courts held that Requested Instruction No. 34 was defective, and therefore was properly rejected by the trial court, *because it erroneously barred punishment for harm to non-parties* – precisely the rule that this Court ultimately repudiated. See Pet. App. 51a-52a; *id.* at 140a. In neither decision did the court rely on sup-

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[5] Accordingly, it is irrelevant that defense counsel did not reiterate this specific point after closing argument. At the time of trial in this case, Oregon's procedural rules did not require a party to note an exception to the trial court's failure to give a requested instruction. Simply requesting the instruction "preserved for appeal the question whether the trial court erred in failing to give that instruction to the jury." *Beall Transp. Equip. Co.* v. *S. Pac. Transp. Co.*, 60 P.3d 530, 535 (Or. 2002).

posed errors of *state* law in *other* portions of the proposed instruction.

Respondent fails, moreover, to explain how the decision below can be reconciled with Oregon precedent. In *State* v. *George*, the Oregon Supreme Court held that a party need not re-word and re-submit a proposed instruction if the trial court has rejected the proposal as a matter of substantive law (rather than because the original request was incorrectly worded), because doing so would be "an exercise in futility." See Pet. 26. Instead of addressing that holding, respondent constructs a straw man, explaining (Opp. 22-23) that a different holding in *George* (involving instructions given pursuant to statutory mandates) does not apply here.

Respondent asserts, in conclusory fashion, that the futility rule is not satisfied here. Opp. 22. But it plainly would have been futile for Philip Morris to resubmit an instruction that corrected the wording of unrelated proposals. At the charge conference, the parties argued separately the harm-to-others portion of the proposed instruction. Pet. App. 156a-162a. The trial court made a separate and independent ruling with respect to Philip Morris's request for an instruction on that subject. See *id.* at 163a ("The Court: So I think I have satisfactorily worked my way through your Element No. 1" of Proposed Instruction No. 34). Accordingly, even if the instruction had not included the "errors" identified by the Oregon Supreme Court on remand, the trial court *still* would have declined to instruct the jury on punishment for harms to non-parties, because the trial

court rejected the instruction on its merits. This is precisely the situation addressed in *George*.[6]

II. THE QUESTION WHETHER THE RATIO GUIDEPOST MAY BE "OVERRIDDEN" IS AS WORTHY OF REVIEW TODAY AS IT WAS TWO YEARS AGO.

Respondent's principal argument on the second question presented – that this Court "chose not to resolve" it in 2007 and therefore should not grant review on it now – ignores the reason this Court previously did not reach the excessiveness issue. It was not because the Court deemed the issue unworthy of review, but rather because it expected the Oregon Supreme Court on remand to grant relief on the first question presented that would have mooted the excessiveness issue. See *Williams*, 127 S. Ct. at 1065. Respondent does not even attempt to defend the Oregon Supreme Court's holding (recently reaffirmed in that court's *Goddard* decision, see Pet. 29-30) that the ratio guidepost is expendable in cases where the jury could have made a finding of great reprehensi-

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[6] The decision below represents a departure from Oregon precedent in yet another respect: the Oregon court chose to overlook *respondent's* failure to preserve for appeal the two points on which the court relied in its remand opinion. Respondent's assertion that she "raised" these arguments "throughout the proceedings" (Opp. 10-11, 13, 15) is misleading: she failed to make one of the arguments before the trial court, and failed to present the other to the Oregon Court of Appeals. See *Amicus Curiae* Brief of Associated Oregon Industries et al. at 11-13; *Brokenshire* v. *Rivas & Rivas, Ltd.*, 957 P.2d 157, 158-159 (Or. 1988) (appellate court generally will not consider an argument that was not raised in the trial court); *Burke* v. *Oxford House of Oregon Chapter V*, 137 P.3d 1278, 1280 (Or. 2006) (refusing to address on review an argument that was not made before the Court of Appeals).

bility. Nor does she address the conflict between that holding and the approach taken by the Ninth Circuit in *Planned Parenthood of the Columbia/Willamette Inc.* v. *American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). See Pet. 31-32.

Respondent contends, as she did in 2006, that we have asked the Court to "elevate" the reasonable relationship requirement, which would "contradict this Court's assignment of primary responsibility" to the reprehensibility guidepost. Opp. 37. But the question presented is not whether the reprehensibility guidepost is more important than the other two. Rather, the question presented is whether a court's subjective determination of reprehensibility can "override" the requirement that there be a reasonable relationship at all. This Court found that question worthy of review in 2006, and it remains so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
Mayer Brown LLP
1675 Broadway
New York, NY 10022
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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AMICUS CURIAE BRIEF

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THOMAS W. BROWN
Counsel of Record
Cosgrave Vergeer Kester LLP
805 SW Broadway
8th Floor
Portland, OR 97205
(503) 323-9000

BEN C. FETHERSTON, JR.
Clark, Lindauer, Fetherston, Edmonds, Lippold & Collier, LLP
880 Liberty Street NE
Salem, OR 97301
(503) 581-1542

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

This *amicus* brief addresses the first question that petitioner Philip Morris USA (Philip Morris) has asked the Court to accept for review.

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BRIEF OF ASSOCIATED OREGON INDUSTRIES, NATIONAL FEDERATION OF INDEPENDENT BUSINESS/OREGON CHAPTER, NORTHWEST GROCERY ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, OREGONIANS FOR FOOD & SHELTER, OREGON METALS INDUSTRIES COUNCIL, OREGON RESTAURANT ASSOCIATION, AND STRATEGIC ECONOMIC DEVELOPMENT CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. INTRODUCTION

A. Statement of Interest of *Amici Curiae*[1]

Associated Oregon Industries (AOI) originated in 1895 as an organization to promote Oregon products. Today, AOI is a nonprofit, statewide business and lobbying organization representing the interests of Oregon businesses. AOI has more than 1600 members, employing approximately 200,000

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[1] Pursuant to Rule 37, these *amici* state: (1) all parties have consented to this brief; (2) notice of intent to file this brief was given to plaintiff on April 16, 2008, three days less than the time required by Rule 37, but plaintiff nevertheless consents to the filing of this brief; (3) no counsel for any party has authored this brief; and (4) no party or entity, other than the Oregon *amici*, their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

people. Member companies include manufacturing, retail, agriculture, technology, healthcare, and construction located throughout Oregon. As an advocate for business, AOI represents its members before Oregon's legislature, courts of law, and rule making agencies on matters dealing with education, the environment, health care, employment and labor law, natural resources, taxation, transportation, workplace safety and workers' compensation, and other issues important to Oregon business.

The National Federation of Independent Business/Oregon Chapter (NFIB/Oregon) represents over 12,000 independently owned Oregon businesses. NFIB/Oregon's purpose is to impact Oregon public policy and be a key business resource for small and independent businesses.

Since 1980, the not-for-profit Northwest Grocery Association (NWGA) has been working for the state's grocery trade as its legislative watchdog, public relations agency and news and information resource. The NWGA serves as the spokesperson for Oregon's grocery industry by promoting the common interests and issues of its membership, and by providing communications, leadership and member services. The NWGA represents the retailers, wholesalers, brokers, manufacturers and suppliers

that support the state's $30 billion dollar grocery industry - one of Oregon's biggest assets.

Oregonians for Food & Shelter (OFS) is a non-profit, proactive, member-funded, grass roots coalition which works to protect the rights of natural resource based businesses in Oregon. Its grassroots base includes over 13,000 individuals and businesses. Its primary focus is protecting those who responsibly use pest management products, soil nutrients and biotechnology from government over-regulation. OFS also regularly becomes involved in a variety of other issues impacting farmers, foresters, and urban businesses relating to natural resources.

OFS has served the natural resource and business communities since 1980. Its key missions are to provide technical expertise and scientifically sound information to the public and policymakers; and to provide education and organization to the agrichemical user community.

The Oregon Forest Industries Council (OFIC) was founded in 1975 to represent and promote Oregon's forest products industry. OFIC is a nonprofit trade association whose 59 members own and manage approximately 5 million acres of private forestland and manufacture a wide array of forest products. Oregon's forest sector directly accounts for over 85,000 jobs statewide which generate $3.5 billion in wage income. As an advocate for the

Oregon forest industry, OFIC represents its members before the Oregon legislature, the Oregon Board of Forestry, rule making agencies, and in courts of law on matters dealing with natural resource management, manufacturing, environmental issues, taxation, and other important concerns of Oregon's forest sector businesses.

The Oregon Metals Industries Council (OMIC) is a trade organization that has represented the interests of Oregon metal manufacturers for over 20 years. Oregon's metal manufacturers employ over 60,000 workers throughout the state. OMIC represents its members before Oregon's legislature and state agencies on a variety of issues, including issues involving product liability, taxation, environmental, and labor.

The Oregon Restaurant Association (ORA) is the leading business association for the restaurant industry in Oregon. Comprised of more than 9,000 restaurant and foodservice outlets, the industry employs a work force of more than 110,000, and creates a total economic impact of $9.7 billion. The ORA represents and protects Oregon's restaurant and hospitality businesses and their suppliers at local, state, and national levels.

The Strategic Economic Development Corporation (SEDCOR) is the lead economic development agency for Marion and Polk Counties in

Oregon. SEDCOR is a private, non-profit membership organization, composed of over 450 business and community leaders, whose mission is to enhance and diversify the economy of the Mid-Willamette Valley by supporting and enhancing the performance of existing businesses and recruiting new businesses to Marion and Polk Counties. Over the past 10 years, SEDCOR has been pivotal in developing over $1 billion in new investment in the Mid-Willamette Valley, creating or maintaining over 5,000 basic sector jobs.

Several Oregon business interest groups, including most of those supporting this brief, joined together as *amici* to support Philip Morris when this case was last before the Court during the 2005 Term, because they were very concerned with the Oregon Supreme Court's failure to understand and follow this Court's existing punitive damages jurisprudence. That concern has significantly deepened for AOI, NFIB/Oregon, NWGA, OFIC, OFS, OMIC, ORA, and SEDCOR (collectively, the Oregon a*mici*) since the case was last in this Court because of the Oregon Supreme Court's refusal on remand to follow the Court's mandate.

The Oregon *amici* urge this Court to again accept review and then reject the Oregon Supreme Court's reason for not addressing the due process rule this Court directed the Supreme Court to apply. Only then can Oregon businesses (and, indeed, all

Oregonians) be sure that Oregon courts will not improperly use state law procedural rules to avoid implementing this Court's constitutional decisions.

B. Summary of Argument

In its 2006 opinion in this case, the Court decided that an instruction that Philip Morris had requested, but the trial court refused to give, correctly stated a due process principle prohibiting the jury from punishing Philip Morris for harm to non-parties, and the Court decided that giving such an instruction, or some comparable protection, was constitutionally required. Consistent with that holding, the Court remanded the case for the Oregon Supreme Court to apply that requirement. Instead of doing that, Oregon's high court affirmed its prior decision on the basis that other, unrelated portions of Philip Morris's requested instruction contained perceived errors of state law. And the Court did that by: (1) ignoring its own well-settled error preservation rules; (2) misapplying its own decisional hierarchy rule; (3) creating a wholly new "correct in all respects" rule for requested jury instructions that applied to defects contained in separate subparts of a requested instruction that cannot fairly be reconciled with *State* v. *George*, 337 Or. 329, 97 P.3d 656 (2004); and (4) reaching a conclusion that cannot be justified based on the court's well-settled "right for the wrong reason" jurisprudence. This Court needs to take this case to ensure that Oregon courts (and, indeed, all

state courts) do not improperly use state law procedural rules to evade the Court's decisions.

II. ARGUMENT

A. This Court's Decision[2]

When this case was last before the Court, it ruled that "[t]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injuries that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams,* 127 S. Ct. 1057, 1063 (2007). The Court explained that, although a jury may consider harm to nonparties in evaluating the reprehensibility of a defendant's conduct, the jury may not "go further than this and use a punitive damages award to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. Accordingly, the Court concluded that "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one," and "it is particularly important that States avoid procedure that unnecessarily

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[2] The relevant procedural history for the case before the Court's decision during the 2005 Term is set out in Philip Morris's petition for writ of certiorari, which the Oregon *amici* adopt.

deprives juries of proper legal guidance." *Id.* And, finally, the Court noted that where the risk of jury confusion is "a significant one, * * * a court, upon request, must protect against that risk. Although States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id.* at 1065 (emphasis in original).

As to Philip Morris's requested instruction prohibiting harm to nonparties (the requested instruction),[3] this Court observed that it "distinguishes between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Id.* at 1064. Additionally, the Court noted that Philip Morris had argued below that the Constitution prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties, and that the

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[3] The requested instruction was actually comprised of several different topics concerning punitive damages. (Petition For Certiorari Appendix [Pet. App.] 159a-160a). Each of the topics was presented as a separately numbered and lettered paragraph. (*Id.*) Some of the topics concerned state law; others concerned federal constitutional issues. After reviewing the requested instruction, the trial court went through each subsection with the parties, solicited comment, and decided whether to give the instruction in each subsection. (*Id.* at 155a-162a).

Oregon Supreme Court had rejected that argument on its merits. *Id.* Because the Oregon Supreme Court had thus applied the wrong constitutional standard, the Court vacated the judgment and remanded "so that the Oregon Supreme Court *can apply* the standard we have set forth." *Id.* at 1065 (emphasis added).

B. The Oregon Supreme Court's Decision on Remand

On remand, the Oregon Supreme Court declined completely to address the constitutional standard that this Court articulated in its decision. Instead, the Supreme Court affirmed its prior decision by finding that other, unrelated subsections of the requested instruction contained errors of state law. *Williams v. Philip Morris USA,* 344 Or. 45, 176 P.3d 1255 (2008). Specifically, the court found that the requested instruction contained two other sections that it decided did not correctly reflect Oregon statutory law on punitive damages – paragraph (2) would have informed the jury that Oregon's statutory criteria for awarding punitive damages in a product liability action could be considered, when the court viewed them as mandatory, and paragraph (2)(c) would have instructed the jury to consider Philip Morris's motivation to earn "illicit profits." *Id.* at 57, 176 P.3d at 1261-62. In light of those conclusions, the court determined that, under Oregon law, the trial court

correctly rejected the requested instruction, thus providing "an independent and adequate state ground for affirming the trial court's ruling." *Id.* at 61, 176 P.3d at 1263-64.

C. The Oregon Supreme Could Not Ignore This Court's Direction On The Basis of Its Claimed "Adequate State Ground"

a. Introduction

Surely, state courts can rely on their procedural rules to decide cases and, when properly invoked, those rules can preclude consideration of inadequately presented federal claims. *See James v. Kentucky*, 466 U.S. 341, 348-49 (1984) (expressing and applying principle). But a state procedural rule cannot bar the protection of federal rights unless the rule serves a legitimate state interest. *Lee v. Kemna*, 534 U.S. 362, 382-83, 122 S. Ct. 877 (2002). And for that to happen, the state rule must be well-settled and consistently applied. *James*, 466 U.S. at 348-49; *see also Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) ("We have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review."); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in

state courts of their federal constitutional rights."); *see also Ford v. Georgia*, 498 U.S. 411, 423 (1991) (following principle expressed in *Patterson*).

Here, in reinstating the judgment for plaintiff, the Oregon Supreme Court: (1) ignored its own well-settled error preservation rules; (2) misapplied its own decisional hierarchy rule; (3) created a wholly new "correct in all respects" rule for jury instructions that applied to defects contained in separate subparts of a requested instruction and that cannot be principally reconciled with *State* v. *George*, 337 Or. 329, 97 P.3d 656 (2004); and (4) reached a conclusion that cannot be justified based on the court's well-settled "right for the wrong reason" jurisprudence. For all of these reasons, the Oregon's Supreme Court's refusal to follow this Court's mandate does not constitute an "independent and adequate" state ground supporting the judgment for plaintiff.

b. Failure to apply well-settled procedural rules

Under well-established state law, Oregon's appellate courts will not consider an argument on appeal if it was not first raised in the trial court. *Brokenshire v. Rivas & Rivas Ltd.*, 327 Or. 119, 121-22, 957 P.2d 157, 158-59 (1998); *State v. Hickman*, 273 Or. 358, 360, 540 P.2d 1406, 1407 (1975); *Stotts*

v. Johnson, 192 Or. 403, 420, 234 P.2d 1059, 1066 (1951); *see also Edwards v. Hoevet,* 185 Or. 284, 297, 200 P.2d 955, 960-61 (1948) ("A familiar rule of appellate practice restricts the appellant to the theory he pursued in the trial court. He can not in this court raise issues that he did not present and rely upon in the circuit court."); Or. R. App. Pro. 5.45(1) ("No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court"). Neither will the Oregon Supreme Court consider an argument that was raised in the trial court, but not made in the Court of Appeals. *Burke v. Oxford House of Oregon Chapter V,* 341 Or. 82, 88, 137 P.3d 1278, 1280 (2006); *Beall v. Tranport Equip. Co. v. So. Pac. Transp. Co.*, 335 Or. 130, 136, 60 P.3d 530, 532 (2002); *Tarwater v. Cupp*, 304 Or. 639, 643-45 & n. 5, 748 P.2d 125, 127-28 & n.5 (1988)[4]; *see also* Or. R. App. Pro. 5.45(1) ("No matter claimed as error [preserved in the trial court] will be considered on appeal unless the claimed error [is assigned as error in the opening brief]"); Or. R. App. Pro. 9.20(2) (issues before Supreme Court are only those issues raised in Court of Appeals).

Here, plaintiff raised the first supposed deficiency in the requested instruction in the trial

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[4] In fact, the Oregon Supreme Court applied that very principle in an earlier decision in this case as a reason for not reviewing one of Philip Morris's arguments. *Williams*, 340 Or. at 54, 127 P.3d at 1176.

court, but did not raise it on appeal until the case was before the Oregon Court of Appeals for the second time. And she did not raise the second problem identified by the Oregon Supreme Court until the case was before that court on remand from this Court. Inexplicably, the Oregon Supreme Court ignored these facts, although they show clearly that, under well-settled Oregon procedural rules, plaintiff did not appropriately preserve either objection for consideration by the Oregon Supreme Court.[5]

c. Improper reliance on the court's decisional hierarchy

Like courts elsewhere, Oregon's appellate courts regularly decide statutory or common law issues before reaching constitutional issues, and they decide state constitutional issues before reaching federal constitutional issues. *See State v. Acremant*, 338 Or. 302, 321, 108 P.3d 1139, 1151 (2005) (court considers all questions of state law before reaching federal constitutional claims); *see also Zockert v.*

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[5] Indeed, in the Oregon *amici*'s view, both the Oregon Supreme Court's failure to rely on *any* independent state ground until remand *and* its disregard for the Court's mandate, support the Court not only taking this case but, as Philip Morris argues, summarily reversing and remanding it. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (supporting first reason given for conclusion); *Sumner v. Mata*, 455 U.S. 591, 597 (1982) (per curiam) (supporting second reason given for conclusion); *Stanton v. Stanton*, 429 U.S. 501, 502 (1977) (per curiam) (same).

Fanning, 310 Or. 514, 520, 800 P.2d 773, 776-77 (1990); *Planned Parenthood Ass'n v. Dep't of Human Res.*, 297 Or. 562, 654, 697 P.2d 785, 787 (1984) (also reflecting decisional hierarchy). And the Oregon Supreme Court cited this hierarchy as the justification – indeed, the requirement – for its reliance on state-law grounds in its decision on remand. *Williams*, 344 Or. at 55, 176 P3d. at 1260; *see also* (Pet. App at 13a, 16a).

But, in their *three* prior decisions in this case, Oregon's appellate courts *never* found that this hierarchy precluded consideration of Philip Morris's constitutional claim; indeed, each time, the courts reached and decided whether a jury may impose punitive damages to punish for harm to nonparties without *any* mention of perceived state law errors regarding other parts of the requested instruction. Thus, the only reasonable conclusion to be drawn from the prior decisions in this case is that, when the case was previously before Oregon's appellate courts, the "mandatory" decisional hierarchy rule did not exist.

d. Creation of new "correct in all respects rule"

In its decision on remand, the Oregon Supreme Court held that the trial court properly refused the requested instruction because of errors it decided existed in other, separate portions of the proposed instruction. 344 Or. at 57, 176 P.3d at 1261-62; *see*

also (Pet. App. at 16a). Although the "correct in all respects" rule for jury instructions has been a part of Oregon law for at least 90 years, the Oregon Supreme Court has *never* found that an instruction on one topic was not "correct in all respects" because it was submitted as part of a larger requested instruction that contained some unrelated error. Indeed, in every previous case in which the court has applied this procedural rule, it has considered the correctness of instructions topic by topic. *See e.g. Sorenson v. Kribs,* 82 Or. 130, 161 P. 405 (1916) (adopting the "correct in all respects" rule and applying it to a requested instruction regarding termination of a broker's employment); *Hooning v. Henry,* 106 Or. 605, 213 P. 139 (1923) (instruction regarding warranty versus opinion of value); *Hotelling v. Walther,* 174 Or. 381, 148 P.2d 933 (1944) (instruction regarding less satisfactory evidence); *Schultz v. Shirley,* 189 Or. 363, 220 P.2d 86 (1950) (various related instructions regarding negligence and duties of care); *Wiebe v. Seely,* 215 Or. 331, 335 P.2d 379 (1959) (instruction regarding weight of circumstantial evidence); *Brooks v. Bergholm,* 256 Or. 1, 470 P.2d 154 (1970) (instruction regarding consideration of wealth in setting compensatory damages); *Owings v. Rose,* 262 Or. 247, 497 P.2d 1183 (1972) (instructions regarding sole proximate cause); *Beglau v. Albertus,* 272 Or. 170, 536 P.2d 1251 (1975) (instructions regarding statutory requirements for headlights); *Hernandez v. Barbo Machinery Co.,* 327 Or. 99, 957 P.2d 147 (1998) (instruction regarding comparative fault); *State v.*

Reyes-Camarena, 330 Or. 431, 7 P.3d 522 (2000) (sympathy instruction); *Bennett v. Farmers Ins. Co. of Oregon*, 332 Or. 138, 26 P.3d 785 (2001) (instruction regarding mutual assent). This case, then, unquestionably reflects a wholly new application of the "correct in all respects" rule.

e. **The new "correct in all respects rule" conflicts with *State v. George***

Additionally, the new "correct in all respects" rule announced by the Oregon Supreme Court on remand cannot be reconciled with that court's decision in *State v. George*, 337 Or. 329, 97 P.3d 656. There, the court held that where a trial court rejects a proposed instruction because it concludes that the jury should not be instructed at all on the subject—and not because it finds fault with the precise wording of the instruction— there is no need to submit a revised instruction, because "[o]ur requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." *Id.* at 339, 97 P.3d at 661-62.

The Oregon Supreme Court never mentioned *George* in its decision on remand. But it certainly was aware of its rule, as reflected by the following colloquy at oral argument:

> MR. GARY: The Court—the Supreme Court will defer to state court

procedural rules, so long as the rules are consistently applied, and so long as they serve a legitimate state purpose. I think that's exactly consistent with what this court has said in its own preservation rulings; that is, in *George* you recognize the application of the correct-in-all-respects rule would not make any sense in terms of the purposes that preservation is designed to serve –

JUSTICE GILLETTE: Our interpretation as to whether *George* is binding, useful or irrelevant, however, is an interpretation which, given any of those three possibilities, the United States Supreme Court wouldn't care about for one second. That is to say, it assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on* * * *George*, for the Court to assume anything different nor for you to claim anything different, Mr. Gary.

MR. GARY: I can't really say that I agree with that until I see what the Court has to say. But of course the Supreme Court has presumed that this court acted in good faith, as do we – [.]

(Pet. App. at 180a-181a).

The rule imposed by the Oregon Supreme Court on remand in this case — that a proposed instruction must be "*correct in all respects* *** [and] altogether free from error" in order to preserve the defendant's argument for appeal, *even if the court rejects on the merits the defendant's substantive legal basis for requesting the instruction* — is logically inconsistent with *George*.[6] No other conclusion credibly exists.

f. Inapplicability of the "right for the wrong reason" rule

Finally, the Oregon Supreme Court misapplied its well-established procedural rule dictating when

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[6] Indeed, application of the rule in such a context is also plainly inconsistent with the general principles underlying the broader preservation rule adopted by Oregon's high court, *see State v. Wyatt*, 331 Or. 335, 343, 15 P.3d 22, 28 (2000); *State v. Hitz*, 307 Or. 183, 188-89, 766 P.2d 373, 375-76 (1988) (the purpose of the preservation rule is to ensure that parties' positions are presented to the trial court in a way that enables it to understand them and avoid or correct the asserted error), including instructional error cases. *See Flint v. Snow*, 249 Or. 510, 512, 439 P.2d 610, 611 (1968) (the "real vice" in an instruction not preserved for review is that the problem with the instruction was "not called to the trial court's attention in any way [so] the trial court was given no opportunity to rule on the issues argued here."). Philip Morris clearly articulated its federal constitutional objection in this case, thus satisfying Oregon's instruction error preservation rule.

an appellate court can affirm a lower court, but for different reasons than those upon which the lower court relied. *See State v. Rogers*, 330 Or. 282, 295-96, 4 P.3d 1261,1269-70 (2000) (reflecting the "right for the wrong reason" principle). Affirming on that basis is *not* proper if, among other things, the other party "*might* have created a different record below had the prevailing party raised that issue, and that record could affect the disposition of the issue." *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or. 634, 659-60, 20 P.3d 180, 195-96 (2001) (emphasis added); *see also Atwood v. Int'l Realty Ltd.*, 266 Or. 595, 596, 514 P.2d 553, 554 (1973) (court declined to consider issue raised by one party for first time on appeal when, had the issue been raised at trial, the other party could have produced relevant evidence); *Landers v. Landers*, 226 Or. 380, 383, 360 P.2d 552, 554 (1961) (same). And even when all the conditions for the "right for the wrong reason" rule are properly met, the rule is a discretionary, and not a mandatory, rule. *Outdoor Media Dimensions, Inc.*, 331 Or. at 659, 20 P.3d at 195.

Here, had plaintiff argued at trial that the court should reject *every* separately discussed section of the requested instruction if *any* separately discussed section was incorrect, Philip Morris could have resubmitted the proposed instructions on punitive damages as separately numbered requested instructions. Moreover, relying on the "right for the wrong reason" rule in such a circumstance –

especially given the procedural history of this case – would be wholly unreasonable because doing so would result in the failure to consider important due process rights. Thus, this could not be an appropriate case for applying the "right for the wrong reason" rule.

As the Oregon Supreme Court acknowledged, Philip Morris submitted various distinct instructions in the requested instruction, including one on the topic of punishment for harm to non-parties. The parties and trial court reviewed each separate subsection independently, and the court separately decided the merits of each of the requested instruction's topics. In the face of this record, no legitimate state interest is possibly furthered by either ignoring well-settled preservation requirements or by applying the "correct in all respects" rule in an entirely new (and nonsensical way), as the Oregon Supreme Court did, to require Philip Morris to submit its instruction on each topic as a separately numbered requested instruction. In short, this is an unfair and, more importantly, wholly inadequate basis for refusing to rule upon Philip Morris's meritorious and correctly asserted federal constitutional claim.

g. Summary

In summary, the Oregon Supreme Court ignored its well-settled procedural preservation

principles, inconsistently applied its decisional hierarchy rule, and applied its "correct in all respects" rule in an entirely new and unjustifiable way that cannot be reconciled with *State v. George*. The Oregon *amici* can find no principled reasons for why Oregon's high court did any of those things. So, the conclusion they reach, is that the court was just unwilling to accept this Court's view that due process required protection against the risk of punishment for harm to nonparties and decided to avoid this Court's mandate by creating and invoking a supposed "independent and adequate state ground." In the circumstances of this case, then, the Oregon Supreme Court misapplied the "adequate and independent state ground" principle as established in this Court's jurisprudence.

III. CONCLUSION

When this case was last before the Court, the Oregon business groups who joined together as *amici* at that time observed that it was "time for the Court to [set] clear standards and clear limits on punitive damages awards that Oregon courts (particularly, its high court) cannot ignore or avoid." The Oregon Supreme Court's decision on remand in this case only reinforces that point. State courts cannot be allowed to improperly ignore this Court's mandates in punitive damages cases recognizing important federal constitutional rights. Accordingly, the Court should take this case and dispose of it in a way that

ensures that the Oregon Supreme Court complies with the Court's prior mandate.

DATED this 23rd day of April, 2008.

THOMAS W. BROWN
Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, OR 97205

Counsel of Record

BEN C. FETHERSTON, JR.
Clark, Lindauer, Fetherston,
Edmonds Lippold & Collier, LLP
880 Liberty Street NE
Salem, OR 97301

Of Attorneys for Amici Curiae
Associated Oregon Industries,
National Federation of Independent
Business/Oregon Chapter, Northwest
Grocery Association, Oregonians for
Food & Shelter, Oregon Forest
Industries Council, Oregon Metals
Industries Council, Oregon Restaurant
Association, and Strategic Economic
Development Corporation

AMICUS CURIAE BRIEF

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IN THE

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PHILIP MORRIS USA,
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v.

MAYOLA WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(Counsel of Record)
IRVING L. GORNSTEIN
KATHRYN E. TARBERT*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Wisconsin; supervised by principals of the firm.*

Attorneys for Amicus Curiae

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BRIEF OF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of the petition for a writ of certiorari because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007) ("*Williams I*"), as providing a

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[1] Pursuant to Rule 37.2(a), the Chamber provided timely notice of its intent to file this brief, and the parties have given their written consent to its filing. Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

much-needed bar to the use of punitive damages to punish defendants for harm caused to nonparties to litigation. The Chamber is concerned, however, that a number of state courts have misunderstood or failed to faithfully enforce the prohibition and procedural protections set forth in *Williams I*. The decision that the petition for a writ of certiorari asks this Court to review—the ruling of the Oregon Supreme Court on remand from this Court's decision in *Williams I*—is illustrative of the problem. The Oregon court ignored this Court's mandate to apply the constitutional standard set forth in *Williams I* and instead applied a novel state procedural bar to "affirm [the judgment against petitioner] without reaching the federal question." Pet. App. 13a. A number of other state courts have taken similar approaches. Unless this emerging trend is stopped now, other courts will likewise be emboldened to disregard *Williams I*, seriously undermining the effect of that important precedent on the administration of punitive damages in the lower courts.

Because the Chamber's members appear repeatedly before this Court and lower courts at both the state and federal levels, the Chamber also has a significant interest in the predictability afforded by the duty of lower courts to reach the merits of federal claims that are fairly presented, especially those that have been the subject of rulings by this Court. Decisions like that of the Oregon Supreme Court threaten the fair enforceability of federal rights. A decision by this Court reaffirming *Williams I* and condemning the Oregon Supreme Court's effort to evade it can simultaneously secure the important due process rights protected by that decision and re-

inforce the duty of lower courts to comply with this Court's mandates.

The Chamber therefore respectfully submits this brief urging the Court to grant the petition and ensure the integrity of this Court's mandate in *Williams I*.

REASONS FOR GRANTING THE WRIT

This case presents an issue of exceptional importance to the institutional authority of this Court: whether a lower court may, for the first time on remand, invent a state procedural obstacle to avoid applying federal constitutional law as mandated by this Court. That issue is of critical importance to American businesses, which routinely appear in state courts and frequently find themselves before local juries eager to punish out-of-state defendants and appellate courts unwilling to correct that bias. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (punitive damages entail "grave risk" that juries "will use their verdicts to express biases against big businesses, particularly those without strong local presences"). As repeat players, those businesses rely on the predictability afforded by the requirement that lower courts comply with the mandates of this Court and the courts of appeals, and on the right to have their federal claims heard when fairly presented.

This Court's decision in *Williams I*, which held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties," 127 S. Ct. at 1063, provided American businesses with much-needed protection against global punish-

ment in individual cases, at the same time reaffirming the bedrock principle that defendants cannot be punished without first receiving "'an opportunity to present every available defense.'" *Williams I*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56 (1972)). But that decision may be in danger. In the fifteen months since *Williams I* was decided, a number of state courts have issued decisions that signal a growing movement to disregard the lessons of that case. *See infra* at 5-9.

Unfortunately, the lower courts' treatment of *Williams I* is symptomatic of the disregard that some state courts show for precedents of this Court that protect the rights of locally unpopular defendants against arbitrary punitive damages awards. The subsequent history of this Court's decision in *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), demonstrates how quickly disregard for a decision of this Court can dilute the force of that precedent. The courts that have been hesitant to apply *Williams I* fully and faithfully will likely be watching the Court's decision in this case very closely. By granting review, this Court can efficiently and effectively ensure the continued force of *Williams I* and make clear that the Court will not tolerate efforts to evade its decisions.

ARGUMENT

I. A Number Of State Courts Have Failed To Apply The Principle Laid Down In *Williams I*

Like a number of state courts, the Oregon Supreme Court in this case failed to follow the directive of this Court in *Williams I* fully and faithfully.

When this Court remands a case to a state or lower federal court for further proceedings, that court "has no power or authority to deviate from the mandate issued by" this Court. *Briggs v. Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948). The court may not "reconsider questions which the mandate has laid at rest," *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940), and it may not "give any other or further relief . . . than to settle so much as has been remanded," *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). The requirement that lower courts comply with the directives issued by this Court ensures that lower courts will predictably apply the decisions that this Court announces and that litigants will be able to rely on those decisions as issued.

The Oregon Supreme Court's decision on remand in this case does not adhere to the directive issued by this Court in *Williams I*. This Court's decision addressed only one question: whether "Oregon had *unconstitutionally* permitted [petitioner] to be punished for harming nonparty victims." 127 S. Ct. at 1062 (emphasis added). Because this Court "believe[d] that the Oregon Supreme Court applied the wrong constitutional standard"—a rule that allowed defendants to be punished for any harm caused by conduct similar to the conduct that harmed the plaintiff—it "remand[ed] th[e] case so that the [state court] c[ould] apply the standard" set forth in *Williams I*. *Id.* at 1065. Instead of doing so, the Oregon court applied an "independent state law standard" under which it affirmed the judgment against petitioner "without reaching the federal question." Pet. App. 13a. As the petition explains, that was error. Pet. 13-20.

The Oregon Supreme Court is not alone, however, in failing to apply *Williams I* fully and faithfully. In the less than fifteen months since *Williams I* was decided, a number of state courts have failed to give effect to the full force of the decision, even when directly ordered by this Court to reconsider an opinion in light of the case. In *Buell-Wilson v. Ford Motor Co.*,[2] for example, the California Court of Appeal concluded that *Williams* "d[id] not require that [it] change any of the holdings in its original opinion." 73 Cal. Rptr. 3d 277, 290 (Cal Ct. App.), *modified on other grounds and reh'g denied*, 2008 Cal. App. LEXIS 515 (Cal. Ct. App. 2008). Like the Oregon Supreme Court, the California court in *Buell-Wilson* concluded that the defendant had not properly preserved its argument against punishment for non-party harm under state law and thus forfeited it. The court in *Buell-Wilson* went further, however, and determined that *Williams I* was inapplicable because "there was no evidence or argument at trial that created a significant risk that the jury, in deciding the amount of punitive damages to award, punished [the defendant] for harm it caused to third parties." *Id.*

That conclusion is baffling. The court itself recognized that plaintiffs had introduced evidence of the defendant's "reckless disregard for the safety of others," the "repeated nature of [the defendant's] conduct," and "serious injuries to [drivers of the] Bronco II," even though that was not the type of ve-

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[2] On remand from *Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007) (granting certiorari, vacating lower court decision, and remanding for further consideration ("GVR") in light of *Williams I*).

hicle driven by the plaintiff. *Id.* at 312, 319. It further recognized that plaintiff's counsel had reminded the jurors during closing argument that they "ha[d] heard of others in California" who had been hurt, that defendant "had had the same problem before," and that defendant "chose to put people in wheelchairs, brain damaged or death" through its "[w]illful disregard of the health and safety of [plaintiff] and those like her." *Id.* at 341-42. If that evidence and argument does not pose a "significant" or "unreasonable and unnecessary risk" that a defendant will be punished for harm caused to nonparties, *Williams I*, 127 S. Ct. at 1065, it is difficult to imagine in what circumstances California courts will conclude that *Williams I* does apply in the future.

The analysis of the Louisiana Court of Appeal in *Grefer v. Alpha Technical*, 965 So. 2d 511 (La. Ct. App. 2007), *cert. denied sub nom. Exxon Mobil Corp. v. Grefer*, ___ S. Ct. ___, 2008 WL 1775070 (2008), reflects similar unwillingness to fairly implement this Court's decision. On remand from this Court in light of *Williams I*, *see Exxon Mobil Corp. v. Grefer*, 127 S. Ct. 1371 (2007), the Court of Appeal held that it would "stand by [its] initial decree" affirming an award of $112 million in punitive damages in a case involving the contamination of land with radioactive waste. The plaintiffs' only claim was for property damage; they did not live or work on the property and were not exposed to the contamination. 965 So. 2d at 526. Yet plaintiffs' counsel urged the jury to award punitive damages based on the health risks that the contamination of their property allegedly posed to the public and to employees who cleaned pipes on plaintiffs' land—individuals who could, and

did, bring their own lawsuits against the defendants. *See infra* at 15. After the GVR from this Court, the Louisiana Court of Appeal affirmed as "both permissible and constitutional" (965 So. 2d at 517) jury instructions that made the sole predicate for punitive damages harm to the public, rather than the plaintiffs. *See id.* at 516-17 ("[Y]ou may award exemplary damages against a defendant when the plaintiff shows that the defendants were wanton or reckless in their disregard for public safety."). Under the guise of analyzing "reprehensibility," the Court of Appeal also justified the punitive damages award on the ground that the defendant, upon recognizing the possibility of contamination, *stopped* sending contaminated pipes to plaintiffs' land, because the court believed that decision put a *third*, "financially vulnerable" party out of business. *Id.* at 522. The court insisted that its decision "afforded [the defendant] all of the constitutional protections available under the Due Process Clause of the U.S. Constitution." *Id.* at 518.

The Supreme Court of West Virginia has ignored the dictates of *Williams I* as well. In *State ex rel. Chemtall Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), *cert. denied*, ___ S. Ct. ___, 2008 WL 355214 (Mar. 31, 2008), the court affirmed as facially consistent with *Williams I* a lower court's decision to have a trial, before the plaintiff class was certified, on "whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier." *Id.* at 164-165. As the *Chemtall* dissent objected, however, a court that determines punitive damages before it determines the set of

plaintiffs involved certainly contravenes the mandate in *Williams I*. A defendant cannot possibly present "every available defense" to the charges against it when the defendant does not know who is making the charges or the number of charges being brought. *Id.* at 170 (Benjamin, J., dissenting in part); *see also Amicus Curiae* Br. of the Chamber in Support of Petitioners, *Philip Morris USA Inc. v. Accord*, No. 07-806, at 2-3 (Jan. 16, 2008) (describing West Virginia Supreme Court of Appeals' approval of similar procedure in another case), *cert. denied*, 128 S. Ct. 1447 (2008).

As these cases indicate, this Court's decision in *Williams I* is at risk. Lower courts are likely to follow the outcome of this case very closely, to see how much latitude they have to distinguish away or altogether disregard this important precedent. As explained below, *infra* at 13-14, a denial of certiorari here could have enormous implications for future cases. By granting certiorari in the very case in which it articulated the prohibition against punishment for nonparty harm, this Court can forcefully reject past efforts to evade *Williams I*, prevent future courts from following the same unlawful course, and reinforce a level of predictability in the application of its mandate that will benefit all litigants.

II. The Treatment Of *State Farm* In Lower Courts Confirms That Review Is Warranted In This Case

The experience following this Court's decision in *State Farm* confirms that the Court's review is necessary here. Even before courts began evading the principle of *Williams I* as described above, a number

of state courts were rejecting the holding and analysis of this Court's decision in *State Farm*. The subsequent history of that case provides a disturbing glimpse into the likely future of *Williams I*, should the Oregon Supreme Court's refusal to follow this Court's instructions go unchecked.

In *State Farm* this Court provided detailed guidance to state and lower federal courts on how to review punitive damages awards to ensure that they are not excessive and that defendants have fair notice of the potential awards to which they might be subject. The Court elaborated on each of three guideposts that it had previously instructed reviewing courts to consider: (1) the reprehensibility of the defendant's misconduct; (2) the ratio between the punitive damages and harm suffered by the plaintiff; and (3) the civil penalties authorized or imposed in comparable cases. *See* 538 U.S. at 418. With respect to ratio, the Court instructed that, "[w]hen compensatory damages are substantial," an award "equal to compensatory damages" will often "reach the outermost limit of the due process guarantee." *Id.* at 425. The Court then concluded that applying "the *Gore* guideposts to the facts of [*State Farm* itself] . . . likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

Despite that clear guidance, the Utah Supreme Court on remand held that due process permitted a punitive award *nine times* the size of the compensatory damages awarded. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 410-11 (Utah 2004). The court reasoned that this Court had erred in con-

cluding that the compensatory award for emotional distress already contained a punitive element and decided instead that the damages for emotional distress actually justified a higher punitive award because conduct that causes emotional harm is "markedly more egregious" than conduct that causes economic harm. *Id.* at 418; *see id.* at 413. That reasoning turned the guidance provided by this Court in *State Farm* on its head.

A number of courts unfortunately followed Utah's lead, ignoring the Court's teaching and affirming punitive awards in ratios much greater than 1:1 where there were undeniably "substantial" compensatory damages. *See, e.g., Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325 (Ark. 2004) (4.9:1 ratio based on $5.1 million compensatory verdict); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004) (6:1 ratio based on $1.5 million compensatory verdict), *cert. denied*, 544 U.S. 920 (2005); *Bocci v. Key Pharms., Inc.*, 79 P.3d 908 (Or. App. 2003) (7:1 ratio based on $5.5 million in compensatory damages). Indeed, Justices of the West Virginia Supreme Court of Appeals have expressed open hostility toward *State Farm*'s important pronouncement concerning permissible ratios,[3] and that court has

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[3] *See, e.g., In re Tobacco Litig.*, 624 S.E.2d 738, 749 (W. Va. 2005) (Starcher, J., concurring) ("As the members of this Court have noted before, *State Farm v. Campbell* . . . was nothing more than a summary, a collation, of prior case law.") (citing cases); *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 367 (W. Va. 2004) (McGraw, J., concurring) (opining that in *State Farm*, "the majority of the nine justices did not focus on 'the degree of reprehensibility of the defendant's conduct,' but instead chose to substitute the jury's judgment with their own.") (citation omitted); *see also id.* at 366 (Maynard, C.J.,

refused to instruct a trial court on remand that "single-digit multipliers are more likely to comport with due process" or even that, to be probative, out-of-state lawful conduct "must have a nexus to the specific harm suffered by the plaintiff." *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 364-65 (W. Va. 2004) (Maynard, C.J., concurring in part and dissenting in part).

A number of courts have recognized that the Court's teaching in *State Farm* does not permit those results. *See, e.g., Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007) (citing *State Farm* and ordering district court to impose ratio between 1:1 and 2:1 because "a substantial compensatory damages award means that a lower ratio is needed to satisfy the requirements of due process"); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (quoting *State Farm* and "[a]ccordingly" reducing punitive damages to amount of compensatory damages); *see also Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235 (3d Cir. 2005) (affirming award that "result[ed] in approximately a 1:1 ratio, which is indicative of constitutionality under *Gore* and *Campbell*").

But lacking further guidance or reaffirmation of

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concurring in part and dissenting in part) ("I fervently hope that the next time a punitive damages award is reviewed by this Court, the majority will abide by the United States Supreme Court's decision in *Campbell*, even if it does not like or agree with *Campbell*'s holdings. . . . *Campbell* is the law of the land, and it must be applied everywhere in the United States, including in West Virginia.").

State Farm from this Court, other courts have continued to affirm increasingly higher ratios, citing as precedent not only early decisions that disregarded *State Farm* but also the Court's denial of certiorari after remand in *State Farm* itself. For example, in *Seltzer v. Morton*, 154 P.3d 561, 611-612 & n.32 (Mont. 2007), the court cited the Utah Supreme Court's decision on remand, and this Court's subsequent denial of State Farm's petition for certiorari, to justify a ratio of over 18:1 based on $1.1 million in compensatory damages for abuse of process and malicious prosecution. Similarly in *Goddard v. Farmers Insurance Co. of Oregon*, 120 P.3d 1260, 1281 & n.24, 1284 (Or. Ct. App. 2005), the court decided upon a 3:1 ratio after noting the 9:1 ratio on remand in *State Farm* and the denial of certiorari. And the Oregon Supreme Court in this very case affirmed a punitive damages award of 97 times the amount of the compensatory damages—a ratio with absolutely no basis in the precedent of this Court. *See* Pet. 31-34.

When *State Farm* was decided, it was hailed as a watershed decision that promised at last to bring order and rationality to judicial review of punitive damages awards.[4] Despite that initial promise, how-

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[4] *See, e.g.*, David G. Savage, *Justices Act to Restrict Punitive Damage Awards: The Supreme Court Ruling is a Move to Control "Irrational and Arbitrary" Verdicts*, L.A. Times, Apr. 8, 2003, at 1 ("The . . . ruling sends a stern warning to state judges and juries to rein in excessive awards."); Editorial, *Punitive Damages on Trial*, Chi. Trib., Apr. 12, 2003, at C26 ("The high court drew some badly needed guidelines on what is reasonable when the courts award punitive damages in civil cases."); Lorraine Woellert & Mike France, *Tort Reform Has Friends in High Places*, Bus. Wk., Apr. 21, 2003, at 78 (arguing

ever, its force has diminished as lower courts increasingly ignore or evade its principles. A similar destiny may await *Williams I* if this Court does not correct the Oregon Supreme Court's blatant failure to heed its directive. Although it is well established that a denial of certiorari creates no legal precedent, *see, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995), the history of *State Farm* in the lower courts demonstrates that a denial can have practical impact—particularly in a case as closely watched as this one. *Cf.* Robert L. Stern et al., Supreme Court Practice 308-09 (8th ed. 2002) (noting improper tendency of lower courts to attach significance to denials of certiorari). A failure by this Court to take action here could unfortunately be viewed by some courts as acquiescence in the Oregon Supreme Court's decision—or in any other decision contrary to *Williams I*. And it could be misinterpreted by some courts as a signal that this Court is not committed to the principles that the Court laid down in *Williams I*. The Court should make clear that is not so, by granting the petition for a writ of certiorari and reversing the judgment of the Oregon Supreme Court.

III. Failure To Reaffirm The Procedural Protections Of *Williams I* Will Have Significant Adverse Consequences For Defendants In Punitive Damages Cases

Granting the petition in this case is also necessary because of the importance of the *Williams I* decision to the fair administration of punitive damages procedures in the lower courts. Absent the protec-

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that "[t]he ruling should inject a level of predictability into high-stakes litigation").

tion extended by *Williams I*, defendants are subject to multiple punishments for causing the same harm. This Court explained as early as *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis" because "in the usual case nonparties are not bound by the judgment some other plaintiff obtains" and "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct." 538 U.S. at 423. The decisions that refuse to apply *Williams I* make concrete the risk of multiple punishment. In *Grefer*, for example, the trial court instructed the jury that it could award punitive damages based upon risk to the public health, and the court of appeal relied upon the harm to a third-party contractor and employees to justify the award. Yet those employees and members of the public had already filed their own suits against the defendant, seeking their own damages for the claimed health effects of the alleged contamination. *See, e.g.*, *In re Harvey TERM Litigation*, No. 01-8708 (La. Dist. Ct. Parish of Orleans, Div. D); *Warner v. ExxonMobil Corp.*, No. 02-19657 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 18, 2005).

In addition to the serious risk of double punishment, the state courts' failure to follow *Williams I* violates the very essence of due process: the right to be heard before a judgment may be entered for or against a party. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their

claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). A lower court that does not protect against the possibility of punishment for nonparty harm effectively turns the individual case into a *de facto* class action, without the *de jure* procedural protections deemed essential to the fair deployment of the class action device. *See, e.g.*, Pet. App. 55a (referring to the "broader *class* of Oregonians" addressed by the litigation) (emphasis added).

The due process risk inherent in such a proceeding is self-evident: if the class representative's claim is not typical of the other claims or if the class members' claims differ materially among themselves, proceeding on a representative basis will almost certainly deny the defendant its right to mount a full and fair defense against each individual claim. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *see also Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."). For example, the defendants in *Buell-Wilson* could not prove that the ostensibly injured nonparties who had driven the Bronco II or had suffered accidents similar to that of the plaintiff would be unable "to establish specific elements" of their claims "or that the defendant [itself could have] establish[ed] unique affirmative defense[s]" to those claims. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 601 (2003). And the defendants in *Chemtall* could not even begin

to attack plaintiffs' claims against them because they did not know who the plaintiffs would be. *Chemtall*, 655 S.E.2d at 164.

In short, the Court's decision in *Williams I* is of critical importance in protecting against arbitrary punitive damages awards, and the lower courts' failure to follow the procedural requirements of the decision severely dilutes that protection. In order to ensure the continued force of the safeguards provided by *Williams I*, and to make clear that this Court's decisions must be followed by lower courts, this Court should grant certiorari and reverse the decision of the Oregon Supreme Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(Counsel of Record)
IRVING L. GORNSTEIN
KATHRYN E. TARBERT*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
**Admitted only in Wisconsin; supervised by principals of the firm.*

Attorneys for Amicus Curiae

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AMICUS CURIAE BRIEF

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IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC.,
PETITIONER,
v.
MAYOLA WILLIAMS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

Of Counsel:

HUGH F. YOUNG, JR.
PRODUCT LIABILITY ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300

JOHN M. THOMAS
Counsel of Record
BRYAN CAVE LLP
161 North Clark Street
Chicago, Illinois 60601
(312) 602-5058

THOMAS J. PALAZZOLO
BRYAN CAVE LLP
211 North Broadway
Suite 3600
St. Louis, MO 63102
(314) 259-2321

Counsel for Amicus Curiae

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This brief is filed on behalf of the Product Liability Advisory Counsel ("PLAC") as *amicus curiae* in support of Petitioner, with the consent of the parties.[1]

STATEMENT OF INTEREST

PLAC is a nonprofit association with more than 120 corporate members representing a broad cross section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also

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[1] Both parties were notified of PLAC's intention to file an amicus brief in support of Petitioner no later than April 11, 2008. Letters of consent from both parties are being filed with the Clerk contemporaneously with this brief. Gibson Dunn & Crutcher LLP ("Gibson Dunn") previously represented PLAC as *amicus curiae* in earlier phases of this litigation. After the conclusion of its representation of PLAC in those earlier proceedings, and after the decision of the Oregon Supreme Court in January 2008, Gibson Dunn was engaged as co-counsel for Petitioner. Portions of this brief are based in part on the prior briefs written for PLAC by Gibson Dunn. Beyond this, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its members (through regular dues payments) made a monetary contribution to this brief.

sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 800 briefs as amicus curiae in both state and federal courts, including at least 70 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. The corporate members of PLAC are listed in the Appendix.

The due process questions presented by this case are not unique to Philip Morris or the tobacco industry. Virtually all corporations are vulnerable to arbitrary and excessive punitive damage awards when juries are not given adequate instructions and reviewing courts decline to enforce the due process guideposts that help ensure reasonableness and proportionality. Because plaintiffs routinely seek punitive damages in product liability cases, and such cases present special dangers and concerns, the fair administration of punitive civil sanctions is an issue of great importance to product manufacturers.

STATEMENT OF THE CASE

Respondent Mayola Williams ("Plaintiff"), the widow of a smoker, sued Petitioner Philip Morris USA, alleging that Philip Morris's fraud in advertising and promoting cigarettes caused the death of her husband from lung cancer. *Williams v. Philip Morris Inc.*, 340 Or. 35, 38-43, 127 P.3d 1165, 1167-71 (2006)("*Williams I*").[2] Plaintiff "based her fraud claim on a 40-year publicity campaign by Philip

[2] Plaintiffs also asserted a negligence claim, but the punitive damage award at issue here is based exclusively on the fraud claim. *See Williams I*, 340 Or. at 44, 127 P.3d at 1171.

Morris . . . to undercut published concerns about the danger of smoking." *Id.* at 39, 127 P.3d at 1168. An Oregon jury awarded Plaintiff $800,000 in non economic damages (reduced to $500,000 pursuant to Oregon's statutory cap on wrongful death damages) and $79.5 million in punitive damages for fraud. *Id.* at 44, 127 P.3d at 1171. The ratio of punitive damages to compensatory damages is either 97:1 or 152:1, depending on whether the capped or uncapped damage award is used in the calculation.

After several years of appellate litigation, the Oregon Supreme Court, purporting to apply this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), held that the punitive damages award was not excessive. *Williams I*, 340 Or. at 63-64, 127 P.3d at 1182. The court acknowledged that "[a]ll arguable versions of the ratio substantially exceed the single-digit ratio (9:1) that the Court [in *State Farm*] has said ordinarily will apply in the usual case." *Id.* at 62, 127 P.3d at 1181. Nonetheless, the court reasoned that a high level of reprehensibility could "overrid[e]" the ratio guidepost:

> Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

Id. at 63, 127 P.3d at 1181.

Construing "all facts in the light most favorable to plaintiff," the court concluded that "there can be

no dispute that Philip Morris's conduct was extraordinarily reprehensible." *Id.* at 55, 127 P.3d at 1177. According to the court, Philip Morris engaged in a scheme to defraud "the plaintiff and many others," and it knew for decades that this scheme "was damaging the health of a very large number of Oregonians—the smoking public—and was killing a number of that group." *Id.* at 63, 127 P.3d at 1181-82. "Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process." *Id.* at 63-64 127 P.3d at 1182.

Philip Morris subsequently filed a petition for writ of certiorari in this Court raising three issues: (1) whether an appellate court's conclusion that the defendant's conduct was highly reprehensible can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm, (2) whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties, and (3) whether, in reviewing a punitive award for excessiveness, an appellate court is permitted to give the plaintiff the benefit of all conceivable inferences that might support a finding of high reprehensibility even if the jury made no such specific factual findings. This Court granted the petition, "limited to Questions 1 and 2." *Philip Morris USA v. Williams*, 547 U.S. 1162 (2006).

After oral argument, this Court held that due process permits consideration of harm to others in evaluating the reprehensibility of the defendant's conduct, but that due process prohibits the use of a punitive damage verdict to punish a defendant

directly for that harm. *Philip Morris USA v. Williams*, __ U.S. __, 127 S. Ct. 1057, 1063-64 (2007)(*"Philip Morris"*). This Court remanded to the Oregon Supreme Court to permit that court to "apply the standard we have set forth." *Id.* Because application of the correct standard "may lead to the need for a new trial, or a change in the level of the punitive damages award," this Court did not "consider whether the award is constitutionally 'grossly excessive.'" *Id.*

On remand, the Oregon Supreme Court addressed only the trial court's failure to give an instruction on the issue of harm to nonparties. *Williams v. Philip Morris Inc.*, 344 Or. 45, 176 P.3d 1255 (2008)(*"Williams II"*). It decided that the proposed jury instruction at issue was flawed for reasons "we did not identify in our former opinion," and that for these "other reasons" the trial court did not err in refusing to give that instruction. *Id.* at 48, 176 P.3d at 1257. With respect to the excessiveness of the award, the Court simply "reaffirm[ed] our prior opinion in all respects." *Id.*

SUMMARY OF ARGUMENT

In 2006, this Court granted certiorari on the question of whether a finding of "extraordinary reprehensibility" could "override" the ratio guidepost for evaluating punitive damage awards and support a punitive award that is 97 times greater than the compensatory award. Nothing has occurred since that time to alter this Court's conclusion that this issue is worthy of review. Lower courts remain divided on whether double-digit ratios of punitive to

compensatory damages are constitutional in cases where compensatory damages are substantial and an elevated degree of reprehensibility is found. In fact, the importance of this issue is highlighted by recent decisions demonstrating that "extraordinarily reprehensible" conduct cannot reliably be defined or identified. Indeed, the approach taken by many courts virtually ensures that "extraordinary" reprehensibility will be found in precisely those cases where any finding of any reprehensibility is most likely to be mistaken.

ARGUMENT

THIS COURT SHOULD ONCE AGAIN GRANT REVIEW TO RESOLVE CONFLICTS IN THE LOWER COURTS ON THE APPROPRIATE APPLICATION OF THE RATIO AND REPREHENSIBILITY GUIDELINES

The Court has held that the excessiveness of a punitive damages award should be determined by reference to three guideposts: (1) the reprehensibility of the defendant's conduct; (2) the ratio between punitive and actual or potential damages; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. Less than two years ago, this Court granted Philip Morris's prior petition for a writ of certiorari specifically on the question of whether the reprehensibility guidepost could "override" the ratio guidepost and support a punitive damage award that is 97 times greater than the compensatory award. Although this Court did not need to reach that issue at that time, nothing has

changed to alter this Court's prior conclusion that the issue is indeed worthy of this Court's review.

On the contrary, lower courts remain deeply divided on whether the reprehensibility guidepost can support a double-digit ratio even when the compensatory award is substantial. Moreover, the importance of this conflict is compounded by disagreements among the lower courts concerning how reprehensibility should be evaluated, particularly in cases involving personal injury. Thus, review of issues relating to these guideposts is warranted today just as it was in 2006.

A. Courts Remain Divided On Whether The Reprehensibility Guidepost Can Override The Ratio Guidepost.

1. As this Court recognized in *State Farm*, the three guideposts must be considered together along with the amount of the compensatory award. "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. However, a greater ratio may be constitutional where "a particularly egregious act has resulted in only a small amount of economic damages." *Id.* Conversely, when compensatory damages are substantial, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

The Oregon Supreme Court's opinion eschews this textured analysis of the three guideposts and the size of the compensatory award altogether.

Under the Oregon Supreme Court's approach, if the court determines that the jury could have found the defendant's conduct to be "extraordinarily reprehensible" and comparable to a crime, any punitive damage award may be upheld, regardless of the ratio of punitive to compensatory damages and regardless of the size of the compensatory award. *Williams I*, 340 Or. at 63, 127 P.3d at 1181-82. The Oregon Supreme Court's approach cannot be reconciled with this Court's opinions. This Court has never suggested that the three due process guideposts are independent factors in the sense that one may offset or trump another. Rather, the guideposts work together to cabin a punitive damage award to a constitutionally acceptable level that reflects fair notice of the severity of the penalty that may be imposed. Consequently, although reprehensibility may move the acceptable ratio within the established range of proportional damages, it does not render the ratio guidepost inapplicable, as the court below held.

In fact, by holding that subjective conclusions about the degree of a defendant's reprehensibility can "override" the constitutional requirement of a reasonable relationship, the decision below eviscerates the only objective guidance as to the appropriate amount of punitive damages. The reprehensibility guidepost, standing alone, "provides little guidance on how to relate culpability to the size of an award." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 590 (1996)(Breyer, J., concurring). Thus, focusing on reprehensibility and disregarding ratio, as the Oregon Supreme Court did in this case, renders the excessiveness inquiry a largely subjec-

tive exercise. Moreover, as discussed in detail below, it does so in precisely those cases involving personal injuries caused by products where juries—and even courts—are most likely to misapply the reprehensibility guidepost and where the additional protection of the ratio guidepost is most needed.

2. Some courts apparently agree with the Oregon Supreme Court that where a defendant's reprehensibility is elevated to some undefined degree the ratio guidepost can, and even must, be disregarded. For example, in *Mission Resources, Inc. v. Garza Energy Trust,* 166 S.W.3d 301, 319 (Tex. Civ. App. 2005), the court concluded that the "highly unlawful" nature of defendant's conduct "*prevents* this Court from concluding that the ratio 20 to 1 was grossly excessive." *See also Superior Federal Bank v. Jones & Mackey Const. Co.*, 93 Ark. App. 317, 327, 329, 219 S.W.3d 643, 651, 653 (2005)(a "significant" or "substantial" degree of reprehensibility supported ratio of 17.6:1); *Seltzer v. Morton,* 336 Mont. 225, 293, 300, 154 P.3d 561, 609, 614 (2007)(reducing 18:1 punitive award to 9:1 notwithstanding "highly reprehensible" conduct, but suggesting a higher ratio would have been proper if the conduct had been even more reprehensible). But the decision of the Oregon Supreme Court directly conflicts with the decisions of other courts. *See. e.g., Boerner v. Brown & Williamson Tobacco Co.,* 394 F.3d 594 (8th Cir. 2005)(reducing 4:1 punitive award to 1:1 notwithstanding "highly reprehensible" conduct); *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists,* 422 F.3d 949 (9th Cir. 2005), *cert. denied,* 547 U.S. 1111 (2006) (reducing double digit punitive awards to 9:1 not-

withstanding "particularly reprehensible" conduct); *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 829 (8th Cir. 2004), *cert. denied*, 543 U.S. 1150 (2005) (8:1 punitive award reduced by district court to 4:1 notwithstanding "extraordinarily reprehensible scheme to defraud").

The existing conflict is well-illustrated by the Eighth Circuit's decision in *Boerner*. That case, like this one, involved a claim for personal injuries against the manufacturer of cigarettes. The jury awarded $4.025 million in compensatory damages and $15 million in punitive damages, a ratio of less than 4:1. The Eighth Circuit found that the defendant's conduct was "highly reprehensible" because the defendant knew it was selling an "extremely carcinogenic and extremely addictive" product and yet "actively misled consumers about the health risks associated with smoking." 394 F.3d at 602-03. Nevertheless, the court concluded that the punitive award was unconstitutionally excessive based on this Court's admonition that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 603, quoting *State Farm*, 538 U.S. at 425. Thus, the Eighth Circuit reduced the punitive award to $5 million, or "approximately 1:1." 394 F.3d at 603. This decision, holding a 4:1 ratio excessive notwithstanding "highly reprehensible" conduct closely related to that alleged in this case, is utterly inconsistent with the Oregon Supreme Court's decision that Philip Morris's conduct could "override" a 97:1 ratio.

B. The Issue Is Particularly Important Because Courts Remain Divided On How To Evaluate Reprehensibility In Personal Injury Cases.

Under the Oregon Supreme Court's decision, defendants whose conduct can be characterized as "extraordinarily" reprehensible (or, perhaps, "extremely," "egregiously," or "highly" reprehensible) are subject to potentially unlimited punitive damage awards unconstrained by the ratio guidepost. This potential would be a matter of serious constitutional concern even if "extraordinarily reprehensible" conduct could be reliably defined and identified. *See, e.g., BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

But such conduct cannot be reliably defined or identified. In this very case, for example, a conclusion that Philip Morris's conduct was "extraordinarily reprehensible" is at least suspect in light of the fact that in most similar cases, Philip Morris has been found not to be liable at all. In fact, as applied by many courts, the reprehensibility analysis is likely to lead to a finding of extreme reprehensibility in precisely those cases where any finding of reprehensibility is most likely to be mistaken: product liability cases, *i.e.*, cases (like this one) involving personal injuries allegedly caused by products.

1. A number of institutional and psychological factors coalesce in product liability cases to create a sort of "perfect storm" for product manufacturers. First, such cases often involve tragic personal injuries likely to provoke passion, prejudice and sympathy, and jurors are asked to make an evaluation—in hindsight and on the basis of arcane expert testimony and a complex factual record—as to whether a product design posed an "unreasonable" risk or whether the manufacturer disclosed sufficient information about that risk. In the highly charged atmosphere of a personal injury trial, the risks of the product (or conduct relating to the product)—often made painfully real by the presence of the injured persons in the courtroom—loom large while the theoretical benefits to society and to people not before the court pale in relative significance.

Judge Easterbrook explained this phenomenon in a products case involving an allegation that an escalator's emergency stop button was too prominent and attractive to children:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . .
>
> Come the lawsuit . . . the passenger injured by a stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical

> arguments discounted in the process of litigation. . . . And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. Otis Elevator Co., 896 F.2d 210, 215-16 (7th Cir. 1990)(Easterbrook, J., concurring)(citations omitted).

This Court echoed this concern just this year in *Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S.Ct. 999, 1008 (2008). In that case, this Court recognized the danger that a jury, evaluating the safety of a medical device, would find the device defective based on the risk of harm without giving adequate consideration to the corresponding benefits:

> A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

Id., 128 S. Ct. at 1008. *See also* Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation*, 59 (1992)(the tort system "leaves the determination of 'too much risk' in the hands of tens of thousands of different juries who are forced to answer the question not in terms of a statistical life, but in reference to a very real victim needing com-

pensation in the courtroom before them," resulting in "random, lottery-like results").

2. Judge Easterbrook and this Court were addressing the risk that the *ex post* perspective of litigation will distort the jury's judgment, not with respect to reprehensibility, but with respect to the questions underlying liability for compensatory damages (*e.g.*, negligence, defect, or fraud). But the problem is compounded when punitive damages are also sought in these cases. Empirical research shows that the largest punitive damage awards are likely to be returned in those cases where the defendant engaged in a sound, socially-responsible cost-benefit analysis:

> The most consistent result across the different scenarios was that undertaking any type of risk analysis was harmful to the corporation's prospects both with respect to the probability of punitive damages and, more importantly, with respect to the magnitude of the award. . . . . Risk analyses and, in particular, analyses that value lives highly, are harmful to the company's prospects, whereas failing to think systematically about risks and undervaluing life is a less costly corporate strategy. The resulting incentives are perverse.
>
> . . . .
>
> . . . . If the costs of the safety measure exceed the benefits, the company is not negligent in failing to adopt it, much less guilty of reckless behavior that would warrant punitive damages. But undertaking this kind of responsible risk analysis indicates that the

> company knew of the risk and intentionally inflicted it on a probabilistic basis, thus triggering punitive damages in the view of the mock jurors.

W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52. Stan. L. Rev. 547, 588 (2000). In other words, this research suggests that jurors are likely to return the largest punitive damage awards in those cases where no damages at all, compensatory or punitive, should be awarded.

3. Notwithstanding the predictable fallibility of juries in cases of this nature, their judgments are typically treated as infallible by reviewing courts in evaluating the reprehensibility of the defendants' conduct. In this case, for example, the Oregon Supreme Court's evaluation of Philip Morris's reprehensibility was expressly predicated on a review of the record which "construe[d] all facts in favor of plaintiff, the party in whose favor the jury ruled." *Williams I*, 340 Or. at 55, 127 P.3d at 1177. Other courts use a similar standard of review. *See, e.g.*, *Buell-Wilson v. Ford Motor Co.*, 160 Cal. App. 4th 1107, 1124, 73 Cal. Rptr. 3d 277, 293 (2008)("disregarding contrary evidence submitted by" the defendant, even where uncontroverted). This standard of review requires reviewing courts to assume that the jury accepted as true everything claimed by the plaintiff that is supported by any evidence, that the jury drew all possible inferences from this evidence in favor of the plaintiff, and that the jury's findings (real or fictional) are indisputably correct. When a court evaluates reprehensibility based on all of these unrealistic assumptions, a finding of extreme reprehensibility in any product

liability case in which the jury has awarded punitive damages is virtually inevitable.

A regulatory agency that set public policy on the basis of such a distorted view of reality would correctly be seen to be acting irresponsibly. But courts like the Oregon Supreme Court assume that it is perfectly acceptable to make public policy based on just such a view of the evidence. If this is nevertheless an appropriate way for an appellate court to view the evidence, the resulting potential for serious error as a result cuts strongly against any due process rule that allows the reprehensibility analysis to override the ratio guidepost.

4. In addition, many appellate courts ignore all objective criteria in judging reprehensibility—including compliance with industry and government standards—and instead focus solely on the fact that the jury found malice and that serious injury resulted. In *Buell-Wilson*, for example, the California Court of Appeal upheld $55 million in punitive damages—plus an additional $23 million in non-economic damages—based on an alleged rollover defect in a sport-utility vehicle. In concluding that the defendant's reprehensibility was "high," the court (1) deemed evidence that the vehicle had one of the best rollover rates of any vehicle in its class to be "irrelevant . . . to the issue of punitive damages," (2) deemed compliance with federal government standards to be insignificant because such government standards "have failed to provide adequate consumer protection," and (3) ignored the fact that the verdict had been preceded by 13 consecutive defense verdicts in other cases alleging the same defect. 160 Cal. App. 4th at 1132, 1134-35, 1151, 1158, 73 Cal.

Rptr. at 299, 301, 314, 319; *see also, e.g., Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302, 1320 n. 21 (11th Cir. 2007) (pet for cert. pending, No. 07-257 (filed Aug. 24, 2007))(finding defendant's conduct to be "exceedingly reprehensible" and deeming the fact that the State of Alabama permitted that conduct to be "of no consequence").[3]

5. The result in cases like *Buell-Wilson* and *Action Marine* is that defendants are found to have acted with a high degree of reprehensibility for conduct that is objectively reasonable, *i.e.*, conduct that reasonable people, including government regulators and other courts and juries, could find—and have found—was entirely reasonable. But not all courts make these types of errors in evaluating reprehensibility.

For example, in *Clark v. Chrysler Corp.*, 436 F.3d 594, 602-604 (6th Cir. 2006), the Sixth Circuit held that Chrysler's failure to conduct a particular type of test was not sufficiently reprehensible to justify a $3 million punitive award where "the test

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[3] The decision in *Action Marine* also illustrates that judges themselves are not immune to the same factors that occasionally lead jurors to reject cost-benefit analysis. In that case, the plaintiff claimed that the owner of a manufacturing plant should be punished for conduct that allowed some amount of carbon black to escape into the atmosphere. Based on the unproven "possibility" that carbon black was a carcinogen, the plaintiff argued that the defendant's conduct was more reprehensible because it reflected an indifference to health and safety. According to the Eleventh Circuit, the "possibility" that carbon black posed a danger to health, "*especially* when the possibility is not well defined, counsels for adoption of extraordinary precautions and justifies extraordinary penalties when available precautions are consciously ignored." 481 F.3d at 1319 n. 20 (emphasis added).

was neither required by the government nor used by other manufacturers" and there was a "good faith dispute" about whether the test was necessary.

7. The decision in *Clark*, unlike the decisions in *Buell-Wilson* and *Action Marine*, is consistent with this Court's precedent. In *BMW*, for example, this Court evaluated the reprehensibility of BMW's failure to disclose pre-sale repairs to a motor vehicle that did not exceed 3 percent of the suggested retail price. In doing so, this Court explicitly considered the fact that several state legislatures had adopted disclosure requirements, that BMW's disclosure policy "coincided with the strictest extant state statute," and that for purposes of deciding what must be disclosed "BMW could reasonably rely on state disclosure statutes for guidance." 517 U.S. at 578, 579.

Even more recently, in *Safeco Ins. Co. of America v. Burr*, __ U.S. __, 127 S. Ct. 2210 (2007), this Court reviewed a decision of the Ninth Circuit that would have permitted punitive damages to be awarded against a defendant for "recklessly disregarding" the requirements of federal law, even though the district court had found that the defendant's interpretation of that law was correct. This Court reversed and held that no punitive damages could be imposed because the defendant's conduct was "objectively reasonable" and the "statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." *Id.*, 127 S. Ct. at 2215, 2216 n. 20. *Safeco* was not based on due process principles, but if objectively reasonable conduct is not sufficiently reprehensible to justify any punitive damages as a matter of federal law, the

objective factors that make such conduct objectively reasonable are logically relevant to the due process reprehensibility analysis.

8. For the reasons discussed above, this conflict in whether courts should consider objective indicators of reasonableness in evaluating reprehensibility is closely related to the issue raised by the petition and further supports review by this Court. In any event, however, the subjectivity that currently pervades reprehensibility analysis in many product liability cases, including this one, demonstrates the importance of adhering to the objectivity provided by the ratio guidepost, *particularly* in cases of alleged "extraordinary reprehensibility."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:

HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park
Drive
Suite 510
Reston, VA 20191
(703) 264-5300

JOHN M. THOMAS
Counsel of record
BRYAN CAVE LLP
161 North Clark Street
Suite 4300
Chicago, IL 60601
(312) 602-5058

THOMAS J. PALAZZOLO
BRYAN CAVE LLP
211 North Broadway
Suite 3600
St. Louis, MO 63102
(314) 259-2321

Counsel for Amicus Curiae

Dated: April 23, 2008

APPENDIX

Corporate Members of the Product Liability Advisory Council

as of 3/6/2008

3M
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company

Coors Brewing Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.

Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company

Smith & Nephew, Inc.
St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.

AMICUS CURIAE BRIEF

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(3)

No. 07-1216

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

ARVIN MASKIN *
KONRAD CAILTEUX
B. KEITH GIBSON
JED P. WINER
ISABELLA C. LACAYO
WEIL, GOTSHAL, & MANGES LLP
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8000

* Counsel of Record

April 23, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

1. Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

2. Whether a punitive damages award that is 97 times the compensatory damages may be upheld on the ground that the reprehensibility of a defendant's conduct can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

In their brief, *amici curiae* will focus only on the first of the two questions presented.

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INTEREST OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as *amicus curiae* in this case when it was before this Court previously. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy and has appeared as co-*amicus curiae* with WLF in this case and in other punitive damages cases in this Court. *See, e.g., State Farm Mut.*

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[1] Pursuant to S. Ct. R. 37, *amici* state that: (1) all parties have consented to the filing of this brief; (2) notice of intent to file this brief was given to respondent on April 18, 2008, after the time required by Rule 37, but respondent does not object on that basis to the filing of this brief; (3) no counsel for any party has authored this brief in whole or in part; and (4) no party or entity, other than *amici curiae*, its members or its counsel, has made any monetary contribution to the preparation or submission of this brief.

Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996).

Amici are concerned that unless review is granted and the Oregon Supreme Court judgment is vacated, this Court's judgment in this and other constitutional cases are vulnerable to being undermined by lower courts. Such a result would not serve the interests of justice and finality.

STATEMENT OF THE CASE

1. This case comes back to this Court for a second time following the refusal of the Oregon Supreme Court to apply the directive of this Court in reversing and remanding the case for further consideration. Rather than apply the constitutional standard set out in this Court's prior opinion, the Oregon Supreme Court ignored this Court's decision by concocting a state law procedural ground—not applied by the Oregon courts at any previous point in this litigation—to reaffirm its prior decision. The Court should grant *certiorari* again to enforce the rule of law it previously announced and to ensure that its mandate is not ignored.

In its decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007), the Court concluded that the Oregon Supreme Court had "applied the wrong constitutional standard when considering Philip Morris' appeal." The Court remanded the case to the Oregon Supreme Court, instructing it to "apply the [constitutional] standard set forth" in the Court's opinion. *Id.* Rather than comply, the Oregon Supreme Court instead ruled that because the jury instruction proposed by Philip Morris purportedly had technical flaws wholly unrelated to the due process issues addressed by this Court—which had been

considered on the merits by the Oregon courts at all stages of the litigation—state procedural rules dictated re-affirmance of its prior opinion without the need to apply the due process principle laid down by this Court. Pet. App. at 21a.

The Oregon Supreme Court's decision effectively disregarded this Court's directions and, in the process, denied Philip Morris the due process right that this Court previously indicated must be enforced on remand. This Court should grant *certiorari* in this case for two reasons: to make clear that lower courts may not pick and choose when to follow a directive from this Court, and to ensure that petitioner's due process rights are protected.

2. This case arises out of the death of Jesse Williams from lung cancer, which was attributed to smoking. Mr. Williams's widow sued Philip Morris for negligence and deceit related to its cigarette marketing practices. Following trial, the jury found petitioner liable and awarded the respondent $821,000 in compensatory damages, which was reduced to $521,485 pursuant to Oregon's statutory cap, and $79.5 million in punitive damages. The trial judge found the punitive damages award "excessive" under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and reduced the award to $32 million. Both sides appealed, and the Oregon Court of Appeals reinstated the $79.5 million punitive damages award. The Oregon Supreme Court denied review, but this Court granted *certiorari*, vacated the decision, and remanded the case to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA v. Williams*, 540 U.S. 801 (2003).

3. On remand, the Oregon Court of Appeals affirmed its prior opinion finding that the $79.5 million punitive damages award was not excessive. *Williams v. Philip Morris USA*, 193 P.3d 126 (Or. Ct. App. 2004). The Court of Appeals rejected Philip Morris's argument that the trial court erred in failing to instruct the jury that it could not award punitive damages in order to punish petitioner for harm to non-parties. *Id.* at 142 ("[W]e are not persuaded by defendant's argument that we erred in our previous decision when we rejected its argument that the trial court erred by failing to instruct the jury that it could not punish defendant for the impact of its misconduct on others."). The Oregon Court of Appeals never raised, or even hinted at, the possibility that Philip Morris had failed to preserve its right to continue to argue that the trial court's ruling on the jury instructions violated its due process rights. Rather, it addressed and rejected Philip Morris's argument on the merits, and held that the trial court did not err in refusing to instruct the jury that it could not punish a defendant for alleged harm to non-parties.

4. Following the second decision by the Oregon Court of Appeals, the Oregon Supreme Court accepted the case. Its review was limited to two questions: whether a defendant is entitled to have the jury instructed "that punitive damages cannot be imposed for alleged harm to non-parties;" and whether the punitive damages award was unconstitutionally excessive. *Williams v. Philip Morris USA*, 127 P.3d 1165, 1171 (Or. 2006).[2] The Oregon Supreme Court held that the

[2] The Oregon Supreme Court declined to consider additional issues that it concluded had not been preserved by Philip Morris on appeal. 127 P.3d at 1171. It did not, however, indicate that Philip Morris had defaulted its constitutional challenge to the trial court's failure to give its requested instruction that the jury may not punish for harm to non-parties.

instruction proposed by Philip Morris was incorrect to the extent it would have prohibited the jury from punishing for misconduct affecting third parties. *Id.* at 1176. The Oregon Supreme Court also evaluated the propriety of the punitive damages award itself and held that it was not excessive. *See id.* at 1176-82. At no time did the Oregon Supreme Court—or any other Oregon court reviewing this case—indicate that there might be some state procedural ground barring further review of whether the jury's consideration of harm to third parties violated Philip Morris's constitutional rights. Instead, each time the Oregon courts reviewed the case prior to this Court's ruling last year, they reviewed the merits of—and rejected—Philip Morris's argument that it was improper to instruct the jury that it could punish Philip Morris for, among other things, harm it allegedly inflicted on non-parties.

5. This Court granted *certiorari* to consider two questions: (1) whether Oregon had unconstitutionally permitted Philip Morris to be punished for harming nonparty victims; and (2) whether Oregon in effect had disregarded the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm. *Philip Morris*, 127 S. Ct. at 1062. The Court answered the first question in the affirmative, holding that the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Id.* at 1063. The Court explained that due process "requires States to provide assurances that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused to strangers." *Id.* at 1064. The Court held that juries cannot punish for harm caused to non-parties even if the alleged harm was produced by the same or similar conduct—thereby rejecting the distinction the Oregon Supreme Court had relied upon in finding that *State Farm*

did not require reversal. *Id.* at 1065.[3] Further, this Court held that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk" that juries may be considering harm to others in seeking to punish a party—which is forbidden—rather than considering such harm "under the rubric of reprehensibility"—which is permissible. *Id.* It remanded the case and directed the Oregon Supreme Court to "apply the standard set forth" in the Court's decision. *Id.* Because application of the constitutional standard the Court laid out had the potential to lead to a new trial or remittitur of the punitive damages award, the Court did not answer the second question—whether the punitive damages award was unconstitutionally excessive. 127 S. Ct. at 1065.

6. On remand, the Oregon Supreme Court framed its task as "apply[ing] the constitutional standard set by the Supreme Court in [its] consideration of the sole issue raised by Philip Morris, *viz.*, whether the trial court erred in refusing to give [Philip Morris's] proposed jury instruction []." Pet. App. at 13a-14a. Because the Oregon Supreme Court found that Philip Morris's proposed jury instructions did not state Oregon law correctly on issues wholly distinct from the due process issue before it, it refused to apply the rule enunciated by this Court and instead reaffirmed its prior ruling. *Id.* at 21a-22a.

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[3] The Oregon Supreme Court had held that *State Farm* did not require it to reverse the punitive damages award because that case only prohibited juries from considering harm to third parties arising from *dissimilar* conduct. 127 P.3d at 1175-76.

REASONS FOR GRANTING THE PETITION

The Oregon Supreme Court's refusal to follow this Court's clear directive should not be tolerated. This Court spent significant amounts of its limited time and resources in resolving an open issue whose merits the Oregon courts had determined without the slightest indication of any state law impediment to doing so. Rather than apply the constitutional standard enunciated by this Court, however, the Oregon Supreme Court instead decided—for the first time on remand from this Court—to invoke a state law procedural bar to consideration of petitioner's due process rights—essentially rendering this Court's prior decision an advisory opinion. Lower courts cannot be allowed to pick and choose which of this Court's mandates they will follow. If the Oregon Supreme Court's disregard for this Court's directives is allowed to stand, it will encourage other lower courts to employ similar tactics in the future whenever they disagree with the results of this Court's review. Accordingly, this Court should grant *certiorari*.

I. THE OREGON SUPREME COURT'S FAILURE TO UPHOLD PETITIONER'S DUE PROCESS RIGHTS RAISES SERIOUS ISSUES THAT SHOULD BE ADDRESSED BY THIS COURT.

A. The Oregon Supreme Court Should Be Required To Apply This Court's Previous Decision.

This Court's prior ruling could not have been more clear—the due process clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . who are, essentially, strangers

to the litigation." *Philip Morris*, 127 S. Ct. at 1063. Moreover, this Court held that the Due Process Clause "requires States to provide assurances that juries are not asking the wrong question," and in the process punishing defendants for harm to those strangers. *Id.* at 1064. That proposition was presented to this Court by petitioner after being rejected on the merits by not only the Oregon Supreme Court, but also the Oregon Court of Appeals (twice) and the trial court. Instead of faithfully applying this Court's ruling on remand, however, the Oregon Supreme Court invoked a novel procedural rule—for the first time in nine years of this litigation—to avoid remedying the constitutional infirmities identified by this Court.

It is a fundamental and bedrock principle of American jurisprudence that the United States Supreme Court is the ultimate arbiter of cases or controversies that come before it. *See Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Accordingly, *all* lower courts must abide by decisions rendered by the Supreme Court. *See Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948) ("In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.") (citations omitted). Indeed, the Supreme Court explained over one hundred years ago the requirement that a lower court strictly comply with a Supreme Court mandate:

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must

> carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); *see also Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209 (1931) (state courts are bound by the decisions of the United States Supreme Court construing federal law).

Given the well-settled role of the Supreme Court—and the concomitant requirement that lower courts comply with its mandates—the Oregon Supreme Court lacked the power to resolve the litigation in a manner inconsistent with this Court's mandate on prior review. By engaging in an extreme exercise of "form over substance," the Oregon Supreme Court employed a type of procedural gamesmanship that this Court should not countenance. If allowed to stand, it will provide a blueprint to other lower courts seeking to avoid this Court's mandates where they do not agree with the decision this Court renders.

B. *Certiorari* Should Be Granted To Ensure That Other Courts Do Not Follow The Oregon Supreme Court's Lead In Disregarding The Directives Of This Court.

Unfortunately, the Oregon Supreme Court's procedural gamesmanship is not an isolated incident. In May 2007, this Court vacated the judgment in *Buell-Wilson v. Ford Motor Co.*, and remanded the case to the California Court of Appeal for reconsideration in light of the *Philip Morris* decision. 127 S. Ct. 2250 (2007). On remand, rather than apply this Court's mandate in *Philip Morris* as directed, the *Buell-Wilson* court followed the Oregon Supreme Court's lead and held that because the jury instructions Ford had proposed "incorrectly and incompletely stated the law," Ford had "forfeited its due process challenge to the punitive damages award." *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 328 (Cal. Ct. App. 2008). In fact, the *Buell-Wilson* court cited the Oregon Supreme Court's action in this case in justifying its own ruling. *See id.* at 337.

Accordingly, the California Court of Appeal did not evaluate whether State procedures had adequately protected Ford against the risk that it would be punished for harm to non-parties, as directed by this Court in *Philip Morris*, 127 S.Ct at 1064. In fact, the California Court of Appeal went so far as to suggest that Ford's failure to preserve its objections meant that this Court did not have jurisdiction over Ford's due process claim, stating "[t]he United States Supreme Court lacks jurisdiction over federal questions 'not pressed or passed upon in state courts.'" *Buell-Wilson*, 73 Cal. Rptr.

3d at 332.[4] As was the case in the Oregon courts, the California Court of Appeal never suggested on its initial review that this Court would not have jurisdiction to consider Ford's due process claims. Moreover, the suggestion that federal jurisdiction was improper makes no sense given that a number of courts, including this Court, spent time and resources ruling on Ford's due process claims on the assumption that the claims were ripe for review.

In the past, this Court has not hesitated to grant *certiorari* in order to correct a state court's attempt to use independent state law grounds as a pretext for ignoring the Court's mandate. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam) (summarily reversing Alabama state court's refusal to apply this Court's mandate on the basis that the order at issue had state law deficiencies separate and apart from those found unconstitutional by this Court) (cited at Pet. 17-18); *Yates v. Aiken*, 484 U.S. 211, 218 (1988) (finding that South Carolina was bound to apply the federal relief found by the Court because "it [had already] considered the merits of the federal claim") (cited at Pet. at 19). Moreover, this Court has granted *certiorari* in situations where a lower court's actions in ignoring this Court's instructions were less egregious than occurred here. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), following the Fifth Circuit's refusal to grant a Certificate of Appealability (COA) on the petitioner's habeas

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[4] In an apparent attempt to backstop its refusal to apply the standard established by this Court in *Williams*, the California Court of Appeal also held that its award of punitive damages—which it reduced from $76 million to $55 million after adjusting plaintiff's non-economic damages—was not unconstitutionally excessive. *Buell-Wilson*, 73 Cal. Rptr. 3d at 318.

petition, this Court ruled 8-1 that there was substantial evidence of racial discrimination in the jury selection at petitioner's trial and ordered the Fifth Circuit to review the claims. On remand, the Fifth Circuit did follow this Court's explicit instruction to grant the COA. The Fifth Circuit, however, affirmed its prior ruling, holding that the petitioner "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." *Miller-El v. Dretke*, 361 F.3d 849, 862 (5th Cir. 2004).

Notwithstanding that the Fifth Circuit followed this Court's explicit directions in granting the COA, it ignored the Court's strong statements regarding the "substantial evidence" put forth by the petitioner of racial discrimination in violation of *Batson*. *Miller-El*, 537 U.S. at 344 ("Disparate questioning [of African-American jurors] did occur . . . [, and] if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination.") (citing *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)). Accordingly, the Court once again accepted review of the case and, because the Fifth Circuit failed to heed the Court's guidance regarding the substantial evidence of discrimination in the case, rather than remand the case again, the Court reversed the petitioner's conviction and ordered a new trial. *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). The Court held that the lower court's finding that there was no *Batson* violation in the jury selection "blinks reality," and that the Fifth Circuit's refusal to rectify the situation was "unreasonable as well as erroneous." *Id.*

Just as this Court granted *certiorari* in *Patterson*, *Yates*, and *Miller-El* to make sure that lower courts follow the Court's directives, it should also do so here. Allowing the Oregon Supreme Court's flagrant disregard for the Court's mandate to go unrectified would give lower courts—especially state courts invoking state law—an opportunity to manipulate this Court's rulings when policy concerns or other factors come into play. Whether it results in the imposition of excessive punitive damages or other violations of individual constitutional rights, the Court should step in to prevent such gamesmanship.

C. The Oregon Supreme Court's Decision Effectively and Impermissibly Rendered This Court's Prior Opinion Advisory.

The Oregon Supreme Court's refusal to apply the correct due process standard to the jury instructions in this case has effectively mooted this Court's prior decision by depriving it of any effect on the judgment in the case. The Court should grant *certiorari* to ensure that its prior opinion is not retroactively nullified by the Oregon Supreme Court's disregard of this Court's mandate.

Doctrines of justiciability preclude federal courts from issuing advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96 (1968). This Court has referred to its inability to issue advisory opinions as the "oldest and most consistent thread in the federal law of justiciability." *Id.*; *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998) (noting that advisory opinions have been "disapproved by this Court from the beginning"); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (citations omitted) ("[Advisory]

opinions, such advance expressions of legal judgment upon issues which remain unfocused . . . we have consistently refused to give."); *Phelps v. Alameda*, 366 F.3d 722, 730 (9th Cir. 2004) ("[W]e remain bound by a longstanding line of Supreme Court precedent refusing to issue an opinion that does not affect the outcome of the case at bar."). As Professor Chemerinsky has observed, "[t]he other justiciability doctrines [, standing, ripeness and mootness,] exist largely to ensure that federal courts will not issue advisory opinions." ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2, at 57 (5th ed. 2007).

In holding for the first time on its second review of this case that petitioner's proposed instruction contained errors of state law wholly unrelated to the issue confronted by this Court, the Oregon Supreme Court is essentially telling this Court that it does not agree with the Court's directive and is going to ignore it. This Court should grant *certiorari* to prevent the Oregon Supreme Court, at this late stage, from rendering this Court's prior opinion irrelevant on an issue of significant constitutional importance.

II. ALLOWING LOWER COURTS TO INVOKE POST-HOC PROCEDURAL ROADBLOCKS WASTES THE RESOURCES OF THE COURT AND THE PARTIES.

Apart from the bedrock principle that inferior courts must abide by this Court's mandates, significant policy considerations lead to the same conclusion—this Court should not countenance attempts by state courts to interpose post-hoc procedural roadblocks as a way to avoid implementing decisions rendered by this Court. Specifically,

considerations of judicial economy and fairness to the parties weigh in favor of this Court granting *certiorari* to ensure that these compelling policy considerations are not frustrated by the inappropriate actions of the Oregon Supreme Court. The courts in the United States, including the United States Supreme Court, are faced with dockets that are becoming more and more crowded. In 2006, less than one percent of the cases filed in this Court were argued.[5] This figure reflects the care with which this Court husbands its resources and evidences the need to make sure that cases that make it to the Court are ripe for review. *See, e.g., Schiro v. Indiana*, 493 U.S. 910, 910 (1989) (noting that United States Supreme Court's *certiorari* docket is "so crowded" and that "it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation"); *Rogan v. Menino*, 175 F.3d 75, 76 (1st Cir. 1999) (referring to "busy trial courts, struggling to manage crowded dockets").

In light of the ever-increasing demands on the court system, and the courts' limited resources to deal with these demands, it is imperative that attention be given to the important interests of judicial economy. *See United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991) (noting "[t]he public interest in judicial economy"); *see also Kerr v. U. S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 403 (1976) (noting that "particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation"); Amy Scott, *Limiting The Jurisdiction Of The Federal Circuit: How Holmes Alters The Landscape Of*

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[5] *See* 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9, available at *http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf.*

Patent Cases On Appeal, 38 GA. L. REV. 429, 433 (Fall 2003) ("The litigation explosion during the post-World War II era caused a backup of cases throughout the judicial system.") (citation omitted). Allowing inferior courts to work an end-run around a Supreme Court decision after that decision has been rendered on the merits is entirely inconsistent with the importance of maintaining judicial economy in an era of over-crowded dockets. Indeed, it needlessly wastes the precious resources of the courts, as well as the time and energy of judges, clerks, attorneys, and parties.

In addition to wasting valuable time and resources, the gamesmanship of the Oregon Supreme Court is fundamentally unfair to the parties. Litigants should not be required to go through years of litigation and expense at multiple levels of state court proceedings—culminating in applications to this Court for relief (for now a third time)—only to have the state high court ignore this Court's clear guidance. Yet, this is precisely the scenario that the Oregon Supreme Court has imposed upon Philip Morris, having waited until *after* this Court ruled before raising a purported independent and adequate state ground for decision for the *first* time. Allowing a state court to avoid the merits of a federal constitutional question after *it* has teed that question up for this Court runs afoul of the important goal of fundamental fairness to litigants. *See, e.g., Intercon Research Associates, Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 57 (7th Cir. 1982) (noting that "one of the goals of the judicial system...is to ensure fundamental fairness to all parties"). The Court should grant *certiorari* to reinforce the principle that cases should not be sent to this Court unless they are ripe for review, and that once this Court decides an

issue, it is too late to interpose state law procedural barriers to prevent implementing this Court's rulings.

CONCLUSION

The petition for a writ of *certiorari* should be granted to address the Oregon Supreme Court's refusal to apply this Court's directive.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Arvin Maskin*
Konrad Cailteux
B. Keith Gibson
Jed P. Winer
Isabella C. Lacayo
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8000

*Counsel of Record

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JOINT APPENDIX

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(8)

No. 07-1216

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

JOINT APPENDIX

ANDREW L. FREY
Counsel of Record
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioner

ROBERT S. PECK
Counsel of Record
Center for Constitutional Litigation, P.C.
777 6th Street NW, #520
Washington, DC 20001
(202) 944-2803

Counsel for Respondent

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CERTIORARI GRANTED ON JUNE 9, 2008

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Opinion of the Oregon Court of Appeals (June 9, 2004) ..... Pet. App. 67a

Opinion of the Oregon Court of Appeals (June 5, 2002) ..... Pet. App. 115a

CIRCUIT COURT OF THE STATE OF OREGON,
FOR THE COUNTY OF MULTNOMAH

No. 970503957

Joann Williams-Branch, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff,

v.

RJ Reynolds Tobacco Company, *et al.*,

Defendants.

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
5/21/97	1	COMPLAINT filed by plaintiff in Multnomah Circuit Court.
9/26/97	9	COMPLAINT AMENDED, adding defendant Philip Morris Inc.
11/16/98	70	Plaintiff's MOTION TO AMEND COMPLAINT to add Punitive Damages is filed.
2/17/99	134	FOURTH AMENDED COMPLAINT filed by plaintiff.
2/19/99	135	ANSWER TO FOURTH AMENDED COMPLAINT filed by defendant.
3/26/99	149	Defendant files proposed JURY INSTRUCTIONS.

DATE	#	DOCKET ENTRY
4/1/99	185/186	Verdict in trial in favor of the plaintiff, awarding punitive damages on fraud claim and no punitive damages on negligence claim.
4/19/99	191	Defendant Philip Morris Inc. files MOTION for reduction of punitive damages award.
5/24/99	199	Defendant Philip Morris Inc. files MOTION for new trial.
5/20/99	201	JUDGMENT of the Multnomah Circuit Court filed.
6/03/99	208	ORDER on defendant's motion for reduction of punitive damages; granted in part reduced to $32 million.
6/22/99	213	ORDER denying defendant's motion for new trial.
6/22/99	214	NOTICE of entry of judgment.

OREGON COURT OF APPEALS

No. A106791

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff-Appellant,

Cross-Respondent,

v.

Philip Morris Incorporated,

Defendant-Respondent,

Cross-Appellant,

and

RJ Reynolds Tobacco Co., *et al,*

Defendants.

RELEVANT DOCKET ENTRIES

DATE	#	DOCKET ENTRY
6/22/99	1	Notice of Appeal filed.
10/26/01	96	Oral Argument.
6/5/02	109	OPINION of Court of Appeals, reinstating full punitive damages and remanding to the Circuit Court.
11/17/03	149	ORDER received from United States Supreme Court remanding case.

DATE	#	DOCKET ENTRY
6/9/04	177	OPINION of Court of Appeals, reinstating punitive damages and remanding to the Circuit Court.

SUPREME COURT OF OREGON

No. S49755

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Plaintiff, Respondent on Review,

v.

Philip Morris Incorporated,

Defendant, Petitioner on Review,

and

RJ Reynolds Tobacco Co., *et al,*

Defendants.

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRY
9/11/02	Petition for review FILED.
12/24/02	Petition for review DENIED.
9/29/04	Petition for review FILED.
12/21/04	Petition for review ALLOWED.
5/10/05	Oral Argument.
2/2/06	Opinion affirming Court of Appeals.
3/30/07	U.S. Supreme Court mandate received.
9/11/07	Oral argument on remand.
1/31/08	Opinion reaffirming prior opinion.

SUPREME COURT OF THE UNITED STATES

No. 02-1553

Philip Morris USA Incorporated,

Petitioner,

v.

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Respondent.

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRY
04/26/03	Petition for writ of certiorari filed.
10/06/03	Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

SUPREME COURT OF THE UNITED STATES

No. 05-1256

Philip Morris USA,

Petitioner,

v.

Mayola Williams, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Respondent.

RELEVANT DOCKET ENTRIES

DATE	DOCKET ENTRY
3/30/06	Petition for a writ of certiorari filed.
5/30/06	Petition GRANTED limited to questions 1 and 2.
10/31/06	Argued.
2/20/07	Judgment VACATED and case REMANDED.
3/26/07	Mandate issued.

EXCERPTS OF RELEVANT TRIAL TRANSCRIPTS AND SUBMISSIONS

Tr. Vol. 3-A
Plaintiff's Opening Argument
(Feb. 24, 1999)

[Tr. 10]

* * *

To this day, they choose to deny any and all responsibility for the massive harm caused to millions of people by their product, including Jesse Williams and his family, and to blame every bit of the lung cancer problem and the other health problems on those souls who chose to buy and use their products.

* * *

Tr. Vol. 3-B
Plaintiff's Opening Argument (continued)
(Feb. 24, 1999)

[Tr. 14]

* * *

Our claim is that what they did and what they actually but [*sic*] into these cigarettes, and what they said, that's the basis of the claim: What they told the American public, what they did to the American public, Jesse Williams being a part of it, that's what creates the claim in this case.

* * *

[Tr. 27] Now, there is another type of damages that you get to in this case if you decide that Jesse Williams was not more greatly at fault than Philip Morris, and this is a separate, completely different calculation that exists without regard to where these damages go, what happens to these damages, and they're called punitive damages.

The consideration is how much money would it take to make it so that Philip Morris, if they behaved in a willful and wanton manner, without disregard for the health and the safety for their customers, including Jesse Williams, how much would it take to punish them and to deter them.

* * *

Tr. Vol. 22-C
Oral Argument on Jury Instructions
(Mar. 23, 1999)

[Tr. 58] THE COURT: I don't think that's an amount statement.

MR. BEATTIE: I'm not expressing myself very well, Your Honor. I apologize. Let me back up and say if there is a difference between the two, I don't think it is significant, and I would go with the statement in plaintiff's requested jury instruction.

THE COURT: Okay. Continuing down plaintiff's first—I would like to go all the way through plaintiffs [*sic*] and then go through defendant's and see what you are offering that isn't here.

MR. BEATTIE: Okay.

THE COURT: Plaintiff's No. 34 then proceeds to set forth the standards by which the jury should determine and assess. Are these the six that are straight out of the statute?

MR. COON: Right. We have omitted the 7th. I think this is intended to be just the statutory language.

THE COURT: Let me look at the statute.

MR. COON: 39.025.

THE COURT: Mr. Beattie, I'm going to read from the statute. If you would like to

* * *

[Tr. 66] MR. BEATTIE: That would be an easier way of thinking of it. Of course, if a defendant comes

to this state and harms somebody, all the conduct that resulted elsewhere in the harm here can be considered.

THE COURT: Cigarettes sold in Oregon to the decedent caused him harm—

MR. BEATTIE: Right.

THE COURT: —as a result of conduct by the decedent out of state. Are you saying that's not punishable?

MR. BEATTIE: That's certainly publishable [*sic*]. What I'm saying is not punishable is other plaintiffs in other states.

THE COURT: I don't disagree we are not here to punish for other plaintiffs' harms. We are here to punish—if we are here at all to punish, if the jury chooses to punish, it is for the conduct that caused harm to Jesse Williams on or after September 1, 1988, right?

MR. BEATTIE: Right.

THE COURT: I'm right there?

MR. COON: That's right. Given that we can consider in determining the amount of harm that has occurred to others because of [Tr. 67] defendants.

MR. RANDLES: That's the problem that BMW v. Gore talked about. For example, in BMW v. Gore, this same argument was made. We are concerned with this car the doctor bought and whether BMW repainted it without telling him before he bought it. The argument was that was improper under Alabama tort law.

The Alabama courts found that's right. Then they said, "BMW is doing this all over the country and defrauding customers all over the country, so you need to punish them and make a statement." Then it calculated what BMW had made or saved based on that conduct and asked for punitive damages based on it. However, there was no showing that that conduct was against the law in other states. Some states actually had laws that specifically allowed it. So BMW v. Gore reversed that award and said—

THE COURT: Because of the risk that the punishment was for harm elsewhere?

MR. RANDLES: Harm elsewhere.

THE COURT: Now, let me go back to you. What's the origin of your argument that you may [Tr. 68] consider the harm caused elsewhere?

Mr. COON: The Oregon statute says you can consider the likelihood that serious harm would arise, profitability, degree of the awareness, duration of misconduct.

It is just not the duration of the misconduct that caused harm to Jesse Williams. It is the duration of the misconduct that caused harm to other people. We should be clear, there is harm to other folks, and then there is harm to other folks outside Oregon.

I don't think maybe the defendants are arguing harm to other people in Oregon. I think they are arguing about what might have happened to people outside of Oregon.

THE COURT: What part of your 34, Mr. Beattie, is directed to this Gore v. BMW?

MR. BEATTIE: Much of it, Your Honor.

THE COURT: Tell me where to look.

MR. BEATTIE: This one aspect is addressed on Page 3 at Lines 1 through 6, carrying over from Page 2. But most importantly at 5 and 6 where I have alternative highlighted, "You are not to punish the defendant for the impact of its conduct on individuals in other [Tr. 69] states" and that works into reviewing plaintiff's requested jury instructions states the statutory standards.

On No. 1, "The Likelihood"—and I'm reading from the bottom of Instruction No. 34 on the first page. "The likelihood at the time that serious harm would arise from Defendant's misconduct." For it to meet the constitutional requirements, it should say, "The likelihood at the time the serious harm would arise in this state for defendant's misconduct."

On 3, "The profitability of defendant's misconduct in this state." Both of those, 1 and 3, have to be state-specific under BMW v. Gore. Otherwise, you would be punishing them for harms to other people outside of Oregon that may not be punishable in those states.

THE COURT: Okay. So you are suggesting that Elements 1 and 3 need the modifier "in this state." What else needs to be done to the statutory elements under your version of the constitutional requirements?

MR. BEATTIE: I think that the elements also have to have something in them that instructs the jury that there should be a [Tr. 70] reasonable relationship between the harm caused to Jesse Williams,

the amount awarded plaintiff, and the amount of punitive damages. This is at the bottom of Page 2.

THE COURT: What's the origin of that argument in terms of authority?

MR. BEATTIE: This is another Gore v. BMW. And I have to confess this is generally addressed post-judgment—post-verdict, at least, in determining whether the amount of punitive damages is constitutionally excessive.

But the cases also state that the same factors that the Court considers in determining whether punitive damages award is constitutionally excessive are or can be the same factors considered by the jury in calculating the award in the first place.

THE COURT: Maybe I'm being too pragmatic here, but don't we have punitive damage instructions that have survived scrutiny post-whatever—

MR. COON: Post-Oberg, we have.

THE COURT: —in Oregon, that would give me some assurance that I'm not just following a statute blindly, but meeting the constitutional [Tr. 71] issues that have been addressed and resolved by our appellate courts?

MR. COON: We don't have—Gore is a '96 case and—

THE COURT: Gore is from Alabama, U.S. Supreme Court, constitutionality issues. I was hoping we could start first by addressing our Oregon Constitution. What we have got here is that our appellate courts have already said is okay before we—

MR. COON: This is an issue, as the Court probably knows, through Oberg, it is something that

Oregon courts have done with their own statute, which was then amended in 1995. And it turns out not to be an Oregon constitutional thing, because there is no due process clause in the Oregon Constitution.

THE COURT: And you had to come here, Mr. Randles.

MR. COON: Without due process. It gets right to the Supreme Court.

THE COURT: Never mind.

MR. COON: One thing that Jay says is important. Many things are important, but one I noticed was that this—these factors, these [Tr. 72] four factors are ones that the Court in Gore apparently, and according to Parrott v. Carr Chevrolet, the Court of Appeals applied post-judgment, or maybe the trial Court applies post-verdict.

So this question of proportionality—one of the other factors is what are the other penalties out there and how does this stack up for any criminal penalties for this conduct that might exist, a factor that I'm not sure that anyone can coherently argue is good grist for jury instruction. That's one of the three Gore factors. One is proportionality, how big is this compared to damages, and one is reprehensibility to the conduct.

THE COURT: Let me stop first and go back to the proportionality point you're making. Is there case law that says that the trial Court shall, in order to have a constitutional instruction, tell the jury about proportionality?

MR. BEATTIE: It has always been addressed post-verdict.

THE COURT: That's where I'm going to address it then. Unless you can show me that [Tr. 73] there is authority that I have to do it for the jury, why wander where no judge has been told to go before?

MR. BEATTIE: I think it is an accurate statement of the law and in the instruction. I certainly understand your view.

THE COURT: I am just trying to be safe. If there is no case law that says I need to do it to be constitutional, and if there is a punitive award, it is a standard I have to evaluate with guidance and briefing from both sides, obviously, I will do that. Unless it is required for the jury, they have got plenty to consider.

So that would be your Element 1 on page 2, Mr. Beattie; is that right?

MR. BEATTIE: That has to do with proportionality. It also has a second prong. It says, "You may consider the extent of harm suffered by others in determining what the reasonable relationship is. You are not to punish the defendant for the impact of its alleged misconduct on other persons who may bring lawsuits of their own in which other juries can resolve their claims and award [Tr. 74] punitive damages for those harms."

This is sort of a State ex rel Crookham sort of rush-to-the-courthouse issue where the defendant is simply trying to make sure, on one hand, that the first person in line doesn't get all of the damages to the exclusion of everybody else. But then, on the other hand, wants to make sure that the defendant is

not being punished in this case for alleged ha ns that other persons can recover for in their own right.

So to the extent in this case they are claiming we should be punished because other persons have been harmed, and you should take into consideration those particular harms, that's not for the jury to consider because those persons themselves can recover.

THE COURT: But the goal of punitive damages is punishment and deterrence in the future; punishment for past misconduct of the defendant and deterring conduct that will hurt those other potential litigants in the future, too, so it is not necessarily resolvable that way.

MR. COON: I guess the way I would [Tr. 75] respond to that, the seven factors in the statute the Legislature has said, "These are the factors, and No. 7 is how much you have paid other people."

So what the Legislature has said is we should look back and see, has this defendant been tagged by other juries for other punitive damage amounts? But it does not say other amounts that might be awarded in the future. And the Legislature—

THE COURT: Well, I know the statute doesn't say that. What I am trying to give due consideration to is whether there is a constitutional standard that I'm obliged to invoke here for the jury's consideration in terms of what they are considering.

It seems to me that, first of all, our Legislature has considered total deterring effect and other punishments. And where there is evidence about that, obviously the jury needs to be instructed on.

In this case, unlike—for example, like the Purcell case, we did have a defendant which had been the subject of other punitive damage awards and chose to litigate that, brought in [Tr. 76] evidence that we had been punished enough and argued to the jury we have been punished enough, and the result was what the result was, and maybe that helped. We don't know, in the end, whether that made the jury go up or down.

But in terms of instructing the jury that when they punish, they shouldn't be compensating for other claimants who haven't yet come to court, to me, that is addressed in part because we are first—we have already told the jury that punitive damages are not compensatory damages.

I would maybe say—instead of saying "intended to compensate plaintiff," I might say "compensatory damages." They are not compensatory. They are punitive. They are designed to punish and deter and, therefore, they are not designed to compensate for other plaintiffs who aren't here, and they are not designed to compensate this plaintiff. They are designed to punish and deter.

So I guess what I'm saying, this seems repetitive to me in that regard, the second half of your Item 1 at the bottom of page 2.

MR. BEATTIE: Well, it really isn't. [Tr. 77] What we're saying in that paragraph, you shouldn't punish us for harms to other persons who can bring their own claims for punitive damages and not compensatory damages per se.

So in calculating the amount of punitive damages under the statute—and let me be candid at this point

here. I understand that you are bound by the statute at this point. I suppose you could declare the statute unconstitutional at some level, but under the Oregon statute that is in the proposed jury instruction the plaintiff has proffered, this element is not there.

THE COURT: Is there case law that says this element has to be there for the jury?

MR. BEATTIE: Not directly, no. It is another one of the considerations that the Court looked at in the BMW case and a number of others.

THE COURT: I think the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one—if you want to maybe introduce "compensate plaintiff or anyone else for damages caused by defendant's conduct," [Tr. 78] if that gets you where you need to be. They are designed to punish and deter.

MR. BEATTIE: Okay.

THE COURT: Do you want to introduce the phrase "or anyone else,"—"compensate plaintiff or anyone else," or are you satisfied with "plaintiff" alone there?

MR. BEATTIE: I would go with the phrase "or anyone else."

THE COURT: Is there error with that?

MR. COON: No error.

THE COURT: So I think I have satisfactorily worked my way through your Element No.1. What other parts of your instruction—

MR. BEATTIE: I'm sorry to keep going backwards.

THE COURT: Hold on. Mr. Randles wants to jump in.

MR. RANDLES: Did we resolve the other states question?

THE COURT: No, we haven't. I have written it in parenthesis yet. I am trying to work myself through all the other pieces and see what is missing and what I am obliged to give [Tr. 79] them.

MR. BEATTIE: The top two paragraphs of Page 2 we didn't address. The first paragraph is not part of any constitutional requirement. It is really common sense that the jury cannot punish defendant for selling a product that causes illness or injury that people are aware of when they purchase the product.

This actually goes to the element of the statute that plaintiff must prove—let's see if I can quote from the statute—that defendant has shown a reckless and outrageous indifference to a highly unreasonable risk of harm.

As we previously briefed to the Court, you don't create a highly unreasonable risk of harm when you sell to a person a product that the person and the seller both know causes certain injuries.

THE COURT: Your Paragraph 1 on Page 2 is closing argument and given by the Court would be a comment on the evidence. I won't give Lines 1 through 8.

Go on.

MR. BEATTIE: 9 is perhaps subject to the [Tr. 80] same infirmity. It is simply an admonition to the jury not to consider awarding punitive damages because defendant is a corporation, because it has substantial financial resources, or because it happens to be from out of state.

THE COURT: Well, this is more like the old "every person is equal before the law" general instruction that sometimes when asked is given upfront, that all persons are equal before the law.

If you want an "all persons are equal before the law" instruction, write one up, I will consider giving it upfront. That's where it usually came as part of the precautionaries. You can insert it by "without bias, sympathy or prejudice, without regard to the plaintiff's status as individuals and families, and without regard to the defendant's status as an out-of-state corporation."

If that's the concept that you want an instruction on, that's the place to put it. Here, it would be a comment, so I won't give it here, but I will consider it as a separate insert to the precautionaries.

MR BEATTIE: That would be good, Your [Tr. 81] Honor.

THE COURT: Next, Lines 13 through 19. This is your language that you prefer instead of, "The amount of punitive damages, if any, shall be determined and assessed based on the following."

You want: "If you determine that some amount of punitive damages should be imposed, it will then be your task to set an amount that is appropriate; such amount as you believe is necessary to achieve the objectives."

MR. BEATTIE: Uh-huh.

THE COURT: I think saying, "The amount of punitive damages, if any, shall be determined and assessed based upon the following," which comes after a statement, "In order for you to assess punitive damages, plaintiff must show by clear and convincing evidence the standard," and it comes after the statement—actually, it comes before the statement, "then punitive damages are assessed to punish defendant and deter misconduct."

This is more words to say the same thing, and I believe the point is adequately conveyed. There is nothing new in Lines 13 through [Tr. 82] 19.

Moving to Page 3.

MR. BEATTIE: We talked about—

THE COURT: Let's talk about the other states part.

Mr. Coon, the defendant is proposing, unless I add a modifier "in this state" to Elements 1 and 3, the instruction is constitutionally infirm.

Do you want to run that risk?

MR. COON: I have to admit I'm a little scared of that, too. I will go along with "in this state."

THE COURT: Item 1, "The likelihood at the time that serious harm would arise in this state from defendant's misconduct." Item 3, "The profitability of the defendant's misconduct in this state."

Moving on to then to Element 2 on Page 3 of defendant's 34.

MR. RANDLES: Your Honor, I don't know, I would like to request that Mr. Coon make sure the

guys making the closings understand that limitation, because arguing it would be occurring [*sic*] the same error, even if it is not [Tr. 83] consistent with the instructions.

THE COURT: I hold every one of those trial lawyers accountable. They have not done this work. You all have been patient and worked line-by-line. If they don't get it, they should expect me to come down on them in the jury's presence. You need to brief your teams, both sides.

MR. BEATTIE: I have mine here.

THE COURT: Well, you need to brief the person who is going to be speaking to the jury, and maybe we can catch their attention before they adjourn tonight sometime. I have a feeling we will be here as long as they are.

MR. BEATTIE: We are nearing the end, Your Honor.

THE COURT: Go ahead. We are on Page 34—No. 34, Page 3, Line 7. What's new here?

MR. BEATTIE: What's new is simply the way in which the statutory factors are analyzed under the constitutional standard. Basically, they hit our statutory factors, or reasonable facsimiles thereof, under the rubric of determining what punishment is necessary to punish defendant based on the degree of [Tr. 84] reprehensibility of defendant's conduct. So basically my A, B, C and D under (2) are identical to the statutory factors.

MR. COON: Illicit profits.

MR. BEATTIE: The illicit profits that I discuss in (C), as well as in (A) talking about the harm

caused by defendant's misconduct are tied to the fact that cigarettes can be lawfully sold. It is reasonable to take a profit from a proper product.

Defendant's misconduct must be something more than simply selling a product that everybody understands is capable of causing injury. It is not the sort of thing that you can punish somebody for selling a knife or selling something that is capable of causing injury.

So I'm trying to separate the fact of injury from the fact of bad conduct, because otherwise they could just go, under (4) in plaintiffs instruction—excuse me—I don't mean (4). I mean (1) and (2), the likelihood at the time that the serious harm would arise from defendant's misconduct and degree of defendant's awareness of that likelihood, the jury could [Tr. 85] take into consideration that the defendant sells cigarettes all the time, knowing that some harm could come from smoking cigarettes.

THE COURT: It is not "some harm" that is actionable. It is harm that is negligently caused or harm that is the result of misrepresentation.

You won the point that punitive damages have to arise from the defendant's conduct which is causally connected to the claim for relief, and that's covered. I don't see anything on Page 3 or 4 that isn't argumentative-counsel material, commentary on the evidence by the Court, and I think all of the points you make your lawyers can argue, if they want to.

I'm not telling the jury that it is an illicit profit. That's not part of the statute. And it doesn't have to be illicit profit. It could be legal profit.

But it arises from reprehensible conduct that meets the constitutional standards, clear and convincing proof, that whole string of words—the profits could be legal, but they are perfectly sufficient to be a basis for punitive damages.

So I wouldn't suggest that your trial [Tr. 86] lawyers use the word "illicit" in the jury's presence, but these concepts can be argued. I decline to give the rest of your No. 34.

MR. BEATTIE: Thank you, Your Honor. I can work out with Mr. Coon basically a modification of his.

THE COURT: Let me review what I have now for plaintiff's 34, and what I would like to see redrafted, just to summarize.

In Paragraph 1, three claims is reduced to two.

In Paragraph 2, the defendant's causation element needs to be worked in.

Then we move up as a new Paragraph 3, the two lines, "If you decide that the defendant has acted," and we insert in that "discretion to assess or not to assess."

Then we go to "Punitive damages are assessed against a defendant to punish misconduct and deter misconduct." And then we have added to the next sentence the phrase "or anyone else" after the word "plaintiff." We have stricken the rest of that paragraph.

And then the next section reads, "The amount of punitive damages, if any, shall be [Tr. 87] determined and based upon the following: The likelihood at the time that serious harm would arise in this

state from the defendant's misconduct." And the only other change is "the profitability of the defendant's misconduct in this state."

That takes care of plaintiff's 34.

MR. BEATTIE: By the way, it was understood that we were going to cross out the $100 million figure in their instruction.

THE COURT: What do you mean "it was understood"?

MR. BEATTIE: When we previously discussed the jury instructions, you said the amounts claimed would be stated—

THE COURT: On the verdict form.

MR. BEATTIE: Okay.

THE COURT: I was being asked whether I was going to write the numbers on the verdict form, and I said no, it comes in the jury instruction on damages.

* * *

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Oral Argument on Jury Instructions
(Mar. 24, 1999)

[Tr. 47] difference. The statute speaks in terms of award. So I'm just going to track the statute throughout.

MR. BEATTIE: Thank you.

THE COURT: Point out to me the causation language if it's different on the two.

MR. BEATTIE: In the second paragraph of the form that I handed the Court says, the first and second sentences, "In order for you to award punitive damages against Defendant, Plaintiff must show by clear and convincing evidence that Defendant, engaging in the conduct, caused Plaintiff's damages, has shown a reckless and outrageous indifference," in the Plaintiff's form.

THE COURT: I see it now.

MR. BEATTIE: The second paragraph, as well.

THE COURT: Well, I would modify even yours, Mr. Beattie, to say, in quotes, "In engaging in conduct which was a cause of damage to Plaintiff," again to be consistent.

Any objection there, Mr. Coon?

MR. COON: No objection, Your Honor.

THE COURT: Any other matter I need to [Tr. 48] address on the form of the punitive damages instruction?

MR. BEATTIE: Not from Defendant.

THE COURT: Mr. Coon?

MR. COON: Not from the Plaintiffs, Your Honor, other than what was previously noted.

THE COURT: All right. Last call on law and regulations, which is to say judicial notice.

When we left discussion yesterday there was a proposal by Mr. Randles that Plaintiffs agree that there is evidence in the record as to each of the three issues that were the subject of the verdict or subject of the proposed instruction, and that that would be satisfactory to the defense, and then the Court would have to instruct on it, and the parties could simply argue about what the witnesses had said regarding the FTC regulating the tar levels at various points in time.

Where are we now on that point?

MR. COON: There is evidence, I understand, in the record, Your Honor.

* * *

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 34

IN THE CIRCUIT COURT OF THE STATE OF OREGON, FOR THE COUNTY OF MULTNOMAH

PUNITIVE DAMAGES–PRODUCTS LIABILITY

I will now instruct you on punitive damages. If you find that Marlboro cigarettes are a defective product or that the defendant is guilty of negligence or fraud, you must consider whether to award punitive damages.

Punitive damages may be imposed only if the plaintiff has satisfied you by clear and convincing evidence that the defendant, in engaging in the conduct that caused Jesse Williams' death, has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

Clear and convincing evidence is evidence of such weight and quality that, even when considered in light of any conflicting evidence, leaves you with a firm conviction that the truth of the matter in question is highly probable.

You have the discretion to award, or not to award, punitive damages. In the exercise of that discretion, you may consider whether the imposition of punitive damages is necessary to punish and deter similar misconduct by defendant and others in the future.

[P. 2] In considering punitive damages, I remind you that the sale of cigarettes has in itself been at all

times a lawful activity in this State. You are not to punish the defendant on account of the propensity of cigarettes to cause illness and death for some of those who smoke them, or the defendant's knowledge of that propensity, except to the extent that the risks from smoking were not a matter of general public knowledge but were known to and unlawfully misrepresented by the defendant.

In determining whether the defendant's conduct is such as to subject it to punitive damages, you must not allow your decision to be influenced by the defendant's financial condition, corporate status, or place of business.

If you determine that some amount of punitive damages should be imposed on the defendant, it will then be your task to set an amount that is appropriate. This should be such amount as you believe is necessary to achieve the objectives of deterrence and punishment. While there is no set formula to be applied in reaching an appropriate amount, I will now advise you of some of the factors that you may wish to consider in this connection.

(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring [P. 3] lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

[ALTERNATIVE]

(1) You are not to punish the defendant for the impact of its conduct on individuals in other states.

(2) The size of the punishment may appropriately reflect the degree of reprehensibility of the defendant's conduct—that is, how far the defendant has departed from accepted societal norms of conduct. Factors that you may find to bear upon the degree of reprehensibility include:

> (a) The likelihood at the time that serious harm would arise from the defendant's misconduct, beyond the harms generally understood to inhere in cigarette smoking;
>
> (b) The degree of the defendant's awareness of that likelihood;
>
> (c) The degree to which the defendant was motivated by a desire to obtain illicit profits from its misconduct;
>
> (d) The duration of the misconduct and any concealment of it;

(3) In determining how much punishment is necessary to achieve the goal of appropriate deterrence, you may consider the extent to which the obligation to pay compensatory damages will suffice to cause defendant and others to refrain from similar misconduct in the future.

(4) Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. However, you may not punish the defendant simply because it is large. Rather, the paramount consideration remains the degree of reprehensibility of any misconduct and the extent of any harm caused by such misconduct.

PLAINTIFF'S REQUESTED JURY INSTRUCTION NO. 34

UCJI No. 75.05A

PUNITIVE DAMAGES–PRODUCTS LIABILITY (In Claims Arising on or After September 9, 1995)

If plaintiff, the estate of Jesse Williams, prevails on any of its three claims, then you must consider whether to assess punitive damages against Philip Morris Incorporated.

In order for you to assess punitive damages against defendant, plaintiff must show by clear and convincing evidence that Philip Morris Incorporated has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others. Clear and convincing evidence is evidence that makes you believe that the truth of the claim is highly probable.

Punitive damages are assessed against a defendant to punish misconduct and to deter misconduct by defendant and others. Punitive damage are not intended to compensate plaintiff for damages caused by defendant's conduct. The question how any punitive damages you may assess will be distributed is not relevant to your determination and should not be considered in any way in your deliberations.

If you decide that the defendant has acted as claimed by the plaintiff, you have the discretion to assess punitive damages.

Punitive damages, if any, shall be determined and assessed based on the following:

(1) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(2) The degree of the defendant's awareness of that likelihood;

(3) The profitability of the defendant's misconduct;

(4) The duration of the misconduct and any concealment of it;

(5) The attitude and conduct of the defendant upon discovery of the misconduct; and

(6) The financial condition of the defendant.

The amount of punitive damages you assess may not exceed $100,000,000.00.

State ex rel Young v. Crookham, 290 Or 61, 65, 618 P2d 1268 (1980); *Noe v. Kaiser Foundation Hospitals*, 248 Or 420, 435 P3d 306 (1967); *Andor v. United Airlines*, 303 Or 505, 511-13, 516-17, 739 P2d 18 (1987); and *Honeywell v. Sterling Furniture*, 310 Or 206, 210-11, 797 P2d 1019, 1021-22 (1990) (paragraph 3).

Tr. Vol. 25
Excerpts of Jury Instructions
(Mar. 26, 1999)

[Tr. 49] Now, on the question of punitive damages, if the plaintiff, the Estate of Jesse Williams, prevails on either the claim of negligence or the claim of misrepresentation or both, then you must consider whether to assess punitive damages against the defendant Philip Morris.

In order for you to award punitive damages against the defendant, plaintiff must show by clear and convincing evidence that the defendant, in engaging in the conduct which was a cause of damage to the plaintiff, showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety and [Tr. 50] welfare of others.

Clear and convincing evidence is evidence that makes you believe that the truth of the claim is highly probable. If you decide that the defendant has acted as claimed by the plaintiff, then you have the sole discretion to award or not award punitive damages.

Punitive damages are awarded against a defendant to punish misconduct and to deter misconduct by defendant and others similarly situated.

Punitive damages are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct.

The amount of punitive damages, if any, shall be determined and assessed based upon the following factors: First, the likelihood at the time that serious harm would arise in this state from the defendant's

misconduct; second, the degree of the defendant's awareness of that likelihood, third, the profitability of the defendant's misconduct in this state; fourth, the duration of the misconduct and any concealment of it; fifth, the attitude and conduct of the [Tr. 51] defendant upon discovery of the misconduct; and, fourth, the financial condition of the defendant.

The amount of punitive damages you assess may not exceed the sum of $100 million dollars.

Tr. Vol. 25
Objections to Jury Instructions
(Mar. 26, 1999)

[Tr. 64]

* * *

THE COURT: Any other exceptions for plaintiff?

MR. COON: No other exceptions.

Thank you, Your Honor.

THE COURT: Mr. Beattie.

MR. BEATTIE: For the defendant and for the record, I understand the Court's rulings on these, and I do not request further argument.

Defendant objects to the Court's failure to give proposed instruction No. 39, which was the duty of a manufacturer of an unavoidably dangerous products, and objects to the giving of instruction 13 on common law negligence, without such an instruction of the manufacturer's duty where the manufacturer makes a product that is unavoidably dangerous.

We also take exception to the Court's failure to give Defendant's 34 on punitive damages, and take exception to the giving of Plaintiff's 34 on punitive damages, to the extent it misstates the constitutional standard set forth in Gore vs. BMW.

Tr. Vol. 26
Jury Verdict
(Mar. 30, 1999)

[Tr. 10]

THE COURT: Are we ready for the jury?

COUNSEL: Yes, Your Honor.

THE COURT: Bring them in, please. Good afternoon, jurors.

JURORS: Good afternoon.

THE COURT: Mr. Argetsinger, you are the presiding juror?

JUROR ARGETSINGER: Yes.

THE COURT: Has the jury reached a verdict?

JUROR ARTGETSINGER: We have, Your Honor.

THE COURT: Would you hand the verdict forms, please, to Mr. Rice? Thank you.

These are verdicts in favor of the Plaintiff on both the negligence and the misrepresentation claims.

On the negligence verdict form, in answer to Question 1, "Was the Defendant negligent," the jury answered yes.

In answer to Question 2, "Was Jesse Williams also negligent," the jury has answered yes.

In answer to Question 3, the jury has allocated 50 percent negligence to each of the [Tr. 11] parties.

In answer to Question 4, compensatory damages, the jury has awarded the agreed economic damages

of $21,485.80 and awarded non-economic damages of $800,000.

In answer to Question 5, "Should punitive damages be awarded," the jury has answered no.

And dated, this form, the 30th day of March.

On the misrepresentation verdict form, the jury has answered yes to Question 1.

In answer to the compensatory damages question, the same damages are entered $21,485, economic damages, $21,485.80, economic damages; and non-economic damages of $800,000.

In answer to Question 3, "Should punitive damages be awarded," the jury has answered yes.

And in answer to Question 4, "What is the amount of punitive damages," the jury has answered $79,500,000.

The form is dated the 30th of March.

Mr. Argetsinger, did at least the same nine jurors agree to each of the verdict forms?

THE WITNESS: We did, Your Honor.

THE COURT: Are there any inquiries [Tr. 12] before the verdicts are received and the jury discharged for the Plaintiffs?

MR. GAYLORD: None, Your Honor.

THE COURT: For the defense?

MR. DUMAS: Yes, Your Honor. We would request that the jury be polled individually, claim by claim.

THE COURT: I didn't hear the last.

MR. DUMAS: Individually polled, Your Honor, by question.

THE COURT: By verdict form and question?

MR. DUMAS: Yes. Yes.

THE COURT: All right.

A poll has been requested, jurors, and the poll asks that I confirm that at least the same nine jurors have agreed. And we need to do this question by question, juror by juror.

I think it's easiest if you just follow along with me with your notes on the verdict forms.

I'm going to read the question, and then your name is going to be called. And you tell me how you answered the question. If you answered, for example, yes to Question 1, say yes. If you answered no to Question 1, say no.

* * *

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

The Estate of JESSE D. WILLIAMS,
by and through MAYOLA WILLIAMS his Personal Representative

Plaintiff,

v.

PHILIP MORRIS INCORPORATED,

Defendant.

Case No. 9705-03957

JUDGMENT

This action came on for trial on February 22 through March 30, 1999 before the Honorable Anna J. Brown. During trial the plaintiff withdrew her claim for strict product liability. During trial Fred Meyer, Inc. was dismissed as a defendant. Plaintiff's remaining claims for negligence and misrepresentation were submitted to the jury. The jury rendered its verdicts as follows:

NEGLIGENCE

"We the jury find:

1. Was the defendant negligent as claimed in plaintiff's [2] complaint, and if so, was such negligence a cause of plaintiff's damages, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

ANSWER: Yes: __X__

No: _____

If your answer to question 1 is "yes," then you should proceed to question 2.

If your answer to question 1 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

2. Was Jesse Williams negligent as claimed in defendant's answer, and if so, was such negligence a cause of plaintiff's damages?

ANSWER: Yes: __X__

No: _____

If your answer to question 2 "yes" [*sic*], proceed to question 3. If your answer to 2 is "no," proceed to question 4.

3. What is the percentage of each of the parties' negligence which caused damage to plaintiff?

ANSWER: Defendant: __50__ %

Jesse Williams: __50__ %

(The percentages must total 100%.)

If Jesse Williams' negligence was more than 50%, your verdict is for the defendant. Do not answer any more questions on this verdict form. The presiding juror should sign this verdict form. Otherwise, proceed to question 4. [3]

COMPENSATORY DAMAGES

4. What are the plaintiff's damages?

ANSWER: Economic Damages: $ 21,485.80

Non-economic Damages: $ 800,000.00

Do not reduce the damages by Jesse Williams' percentage of fault, if any, because the Court will do that when it enters judgment. Proceed to question 5.

PUNITIVE DAMAGES

5. Should punitive damages be awarded against defendant?

ANSWER: Yes: _____

No: X

If your answer to question 5 is "yes," proceed to question 6.

If your answer to question 5 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

6. What is the amount of punitive damages you award against defendant?

ANSWER: $_____

DATED this 30th day of March, 1999.

/S/ Ernest Argetsinger
Presiding Juror"

MISREPRESENTATION

"We the jury find:

1. Did defendant make false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied, and if so, were such false representations and reliance a cause of [4] damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988?

ANSWER: Yes: __X__

No: _____

If your answer to question 1 is "yes," then you should proceed to question 2.

If your answer to question 1 is "no," do not answer any further questions on this verdict form. The presiding juror should sign this verdict form.

COMPENSATORY DAMAGES

2. What are the plaintiff's damages?

ANSWER: Economic Damages: $ 21,485.80

Non-economic Damages: $ 800,000.00

PUNITIVE DAMAGES

3. Should punitive damages be awarded against defendant?

ANSWER: Yes: X

No: _____

If your answer to question 3 is "yes," proceed to question 4.

If your answer to question 3 is "no," do not answer any further questions on this verdict form. You [*sic*] [5] juror presiding should sign this verdict form.

4. What is the amount of punitive damages you award against defendant?

ANSWER: $ 79,500,000.00

DATED this 30th day of March, 1999.

/S/ Ernest Agetsinger
Presiding Juror" [P. 5]

The court received the verdict. In light of the jury's conclusion that decedent was 50% at fault, the verdict on the negligence claim is reduced to $10,742.90 in economic damages and $400,000.00 in noneconomic damages. On the misrepresentation claim the jury's verdict for noneconomic damages is reduced to $500,000.00 by application of ORS 18.560.

Following the verdict defendant filed a Motion for Reduction of Punitive Damages Award. After a hearing, the court reduced the punitive damages award to $32,000,000.00.

Defendant has objected to plaintiff's form of judgment. Defendant claims that the Master Settlement Agreement provides for a release (or, in the alternative, an offset) of the State of Oregon's portion of the punitive damages verdict and judgment in this case.

The Court has decided to enter judgment without adjudicating the merits of defendant's claim of release. The Court orders that the claim of release will be adjudicated in a later action. The State and the parties agree that the claim of release has been properly raised and preserved. The State and the parties further agree that adjudicating the claim of release in a later action, and not before the entry of judgment in this case, will in no way affect the rights of the State and defendant to fully adjudicate that claim and to obtain whatever relief is proper.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's claim for strict product liability is dismissed. [6]

IT IS FURTHER ORDERED AND ADJUDGED that Fred Meyer, Inc. is dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the judgment for compensatory damages shall not exceed the greater amount of the award on plaintiff's claim for negligence or plaintiff's claim for misrepresentation, plus interest, costs and disbursements as provided by law.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall have judgment against defendant in the amount of $521,485.80 for compensatory damages, plus interest, costs and disbursements as provided by law, and plaintiff and the State of Oregon shall have judgment against the defendant for $32,000,000.00 for punitive damages, plus interest as provided by law.[1] [7]

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[1] Plaintiff disputes the State's right and interest in any of the damages.

MONEY JUDGMENT

Judgment Creditors:	The Estate of Jesse D. Williams by and through Mayola Williams State of Oregon, Criminal Injuries Compensation Account of the Department of Justice Crime Victims Assistance Section, for that portion of the punitive damages award to which the State is entitled pursuant to ORS 18.540(1)(b), which provides that "[s]ixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section[.]"
Attorney for Judgment Creditor The Estate of Jesse D. Williams by and Through Mayola Williams:	Raymond F. Thomas Swanson, Thomas & Coon

	William A. Gaylord Gaylord & Eyerman
Attorney for Judgment Creditor State of Oregon:	Hardy Myers Attorney General
Judgment Debtor:	Philip Morris Incorporated

NON-ECONOMIC DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS	$500,000.00
ECONOMIC DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS	$21,485.80
PUNITIVE DAMAGES IN FAVOR OF THE ESTATE OF JESSE D. WILLIAMS and STATE OF OREGON, for that portion of the punitive damages award to which the State is entitled pursuant to ORS 18.540(1)(b), which provides that "[s]ixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section":	$32,000,000.00

[P. 8]

POST-JUDGMENT INTEREST:

Principal Amount of Money Judgment:	$32,521,485.80
Interest Start Date:	May 13, 1999
Interest Rate:	9%
Interest Type:	Simple
COSTS and DISBURSEMENTS:	As provided by law and pursuant to ORCP 68.

DATED this 20th day of May, 1999.

_____

Hon. Anna J. Brown
Circuit Court Judge

Submitted by:

Maureen Leonard
921 SW Washington, Suite 764
Portland, Oregon 97205
Telephone: (503) 224-0212

James S. Coon
Swanson, Thomas & Coon
621 SW Morrison, Suite 900
Portland, Oregon 97205
Telephone: (503) 228-5222

Of Attorneys for Plaintiff

EXCERPTS FROM APPELLATE BRIEFS FILED IN THE OREGON COURT OF APPEALS AND OREGON SUPREME COURT

Excerpts from Philip Morris's Brief in the Oregon Court of Appeals (Nov. 14, 2000)

[P. 8]

* * *

3. *Punitive Damages.*

Plaintiff argues that the court should reinstate the jury's $79.5 million punitive damage award—an award that would be many times larger than any Oregon appellate court ever has sustained. In fact, however, even the $32 million punitive damage award permitted by the trial court is grossly excessive and must be set aside for several reasons.

First, two highly prejudicial instructional errors require that the entire punitive damage award be set aside. The trial court refused to instruct the jury of the constitutional guidepost that any award of punitive damages should bear a reasonable relationship to the harm suffered by Williams. It then compounded the effect of this omission by instructing the jury that the outer limit of the punitive damage range was $100 million—a figure selected arbitrarily by Plaintiff that the court itself later acknowledged to be grossly excessive. No jury so simultaneously uninformed and misinformed could return a valid punitive damage verdict.

* * *

[44]

III. Cross-Appellant's Assignment of Error No. Three.

The trial court erred by refusing to instruct the jury that punitive damages should bear a reasonable relationship to Williams' harm.

Defendant's Requested Jury Instruction No. 34 included the following language:

> "(1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit." Def. Supp. Abs. A-1 to A-2.

[45] The court refused to so instruct:

> "THE COURT: I think the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one—if you want to maybe introduce 'compensate plaintiff or anyone else for damages caused by defendant's conduct,' if that gets you where you need to be. They are designed to punish and deter." Tr. Vol. 22-C at 77-78.
>
> * * * * *
>
> "[THE COURT]: I decline to give the rest of your No. 34." *Id.* at 86.

Excerpts from Philip Morris's Petition for Review in the Oregon Supreme Court (Sept. 11, 2002)

[P. 31]

* * *

3. *The Jury Should Have Been Instructed That Its Award of Punitive Damages Should Be Proportionate To Harm To Williams and Not To Third Parties.*

The Court of Appeals rejected defendant's assertion that the trial court should have instructed the jury that its award should bear a reasonable relationship to the harm caused to Jesse Williams and not the harm to third parties. The court found that the defendant's proposed instruction was partially incorrect. According to the court:

> "[T]he proposed instruction would also have told the jury not to punish defendant for alleged misconduct towards other persons who might bring their own cases and receive their own punitive damages awards. In *Parrott*, the Supreme Court made [32] clear that the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages. The proposed instruction's speculative reference to unknown other lawsuits by unknown other plaintiffs was contrary to that principle. it is also inconsistent with ORS 30.925(2)(g), which allows the jury to consider other punishments already im-

posed on the defendant." *Williams*, 182 Or App at 63-64 (citations omitted).

For the reasons discussed above, the Court of Appeals misinterpreted the appropriate measure of harm when considering the proportionality of the punitive award. The court, therefore, was wrong to dismiss defendant's assignment of error on this ground.

The purpose of jury instructions is to inform the jury of the legal principles that must guide their deliberations. *Sherrard v. Werline*, 162 Or 135, 157, 91 P2d 344 (1939). The jury should be informed of controlling law in complete, clear and unambiguous terms. *Williams v. Portland General Electric Co.*, 195 Or 597, 608, 247 P2d 494 (1952); *Stage v. St. Pierre*, 224 Or 395, 401, 356 P2d 432 (1960); ORCP 59B. The requirement that a punitive damages award bear a reasonable relationship to the harm suffered by the plaintiff, as measured in the ordinary case by the amount of the compensatory damages awarded, is a fundamental legal principle applicable to the jury's consideration of a claim for punitive damages. Defendant was entitled to have the jury advised of this constitutional constraint on the size of the jury's award of punitive damages. The omission of this instruction was prejudicial even if the 97:1 ratio approved by the Court of Appeals does not exceed the constitutionally allowable maximum. The jury, if properly informed that the relationship between compensatory and punitive damages must be reasonable, may well have decided to set punitive damages at a level reflecting a far more modest ratio. By refusing to give this instruction, the court left the jury without any hint of this important aspect of its punishment-setting inquiry and deprived Philip Mor-

ris of the benefit of a determination by the jury as to what ratio was appropriate.

[33] Due process entitles defendant to have the jury correctly instructed as to the constitutional parameters of an acceptable punitive damages award. *Haslip*, 499 US at 18-24 (adequately instructed jury, post-verdict hearing and appellate court review provide full protection required under due process). The trial court's failure to instruct the jury on the reasonable relationship requirement was prejudicial error. That error was compounded by the court's instruction that punitive damages could not exceed $100 million—a number whose only significance is that it was selected arbitrarily by plaintiff and stated in the complaint. While it is true that no punitive damages judgment ultimately could be entered in an amount exceeding the plaintiff's prayer, *Lovejoy Spec. Hosp. Inc. v. The Advocates for Life, Inc.*, 121 Or App 160, 167, 855 P2d 159 (1993), informing the jury of that amount was wholly unnecessary to enforcement of that limit. Moreover, in instructing the jury that the punitive damages could not exceed $100 million, the trial court did not even explain that this upper limit was derived from plaintiff's complaint, and was not intended to advise the jury that $100 million was in fact a legally permissible amount of punitive damages to award. Significantly, the court had given the jury a similar admonition when instructing earlier on the upper limit of any award for non-economic damages.

The Court of Appeals was satisfied that "[t]he trial court in its instruction merely told the jury what plaintiff alleged. *** [T]elling the jury the upper limit that the pleadings establish for its verdict is consistent with ordinary Oregon trial prac-

tice." *Williams*, 182 Or App at 64 (citation omitted). Nevertheless, it is error for the court to follow that practice when doing so violates the federal constitution. *See State v. Wagner*, 309 Or 5, 15-16, 786 P2d 93 (1990) (jury instructions must meet both state law and federal constitutional requirements). The instructions in this case left the jury with only one quantitative guideline for the exercise of its discretion—the $100 million figure arbitrarily injected into the case by plaintiff. Recent empirical studies have demonstrated that an instruction such as this will [34] seriously distort the jury's deliberations. *See* Cass R. Sunstein, et al., *Punitive Damages: How Juries Decide*, 211, 240 (2002). This court should grant review to correct the Court of Appeals' error, and to establish that juries must be instructed on the constitutional limitations of their discretion to award punitive damages.

Excerpts from Williams's Brief on Remand in the Oregon Court of Appeals (Jan. 30, 2004)

[P. 17]

* * *

II. DEFENDANT IS NOT ENTITLED TO A NEW TRIAL

A. The Trial Court Committed no Instructional Error

1. *Campbell* does not require a "proportionality" instruction

Defendant's primary argument for new trial is that *Campbell* made it unconstitutional for the trial court to decline a "proportionality" instruction. Defendant's Brief at 5-9. That is not an accurate characterization of the Supreme Court's decision. The only mention of jury instructions in the Court's decision concerned limiting the use of evidence of out-of-state conduct. 123 S Ct at 1522-23.[15]

Due process does not require a "proportionality" instruction, and defendant's assignment of error

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[15] Indeed, the trial court in this case instructed the jury that punitive damages should be determined from the likelihood of serious harm "*in this state*" caused by defendant's misconduct and profitability of "defendant's misconduct *in this state*," among other factors. Transcript Vol. 25 at 50 (emphasis added).

should be rejected for the same reasons discussed in this court's initial opinion.[16] 182 Or App at 63-64.

2. Defendant's "proportionality" instruction contained multiple errors of law

An Oregon trial court is not required to give an incorrect jury instruction "or to [18] give the correct portions of one which includes errors." *Simpson v. Sisters of Charity*, 284 Or 547, 560, 588 P2d 4 (1978). Defendant's instruction number 34, which included the paragraph on "proportionality" whose omission defendant laments, contained three and one half pages and several errors of law. Appendix A. Instruction number 34 would have told the jury, among other things, that

> You are not to punish the defendant on account of the propensity of cigarettes to cause illness and death for some of those who smoke them, or the defendant's knowledge of that

---

[16] The Court's more general comment, still limited to the question of tangential evidence, was that "vague instructions, or those that merely inform the jury to avoid 'passion or prejudice' *** do little to aid the decision maker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." 123 S Ct at 1520. The trial court in this case specifically instructed the jury as to the relevant statutory factors under ORS 30.925 as well as the purpose of punitive damages, the fact that they are not intended as compensation, and they are limited to punishing harm in the state of Oregon. Transcript Vol 25 at 49-51. *See Waddill v. Anchor Hocking*, *supra*, 190 Or App at 179 n.4 (Oregon punitive damages criteria provide guidance missing in *Campbell*).

> propensity, except to the extent that the risks from smoking were not a matter of general public knowledge but were known to and unlawfully misrepresented by the defendant.

Appendix A at 2. There is no evidence nor any legal authority to support this instruction, and it is flat wrong. It is plainly far more reprehensible to commit fraud with respect to a product defendant knows is addictive and kills thousands of its users than with respect to a product that is more benign, whether the risks are known or not. The "consequences of defendant's fraudulent conduct [are] certainly relevant to an award of punitive damages." 182 Or App at 64-65 n.18.

Defendant repeated a related and similarly untenable idea later in the same requested instruction, stating as a factor relevant to punitive damages

> The likelihood at the time that serious harm would arise from the defendant's misconduct, beyond the harms generally understood to inhere from cigarette smoking;

Appendix A at 3. This part of the instruction was similarly wrong on the law, and the trial court had no obligation to give it.

In addition, defendant's instruction number 34 stated as a factor concerning punitive damages

> [19] The degree to which defendant was motivated by a desire to obtain illicit profits from its misconduct;

Appendix A at 3. As the trial court noted, the law does not require that profits have been "illicit." Tr Vol 22-C at 85. Defendant's conduct may have been

perfectly legal, but if it merits punitive damages, the question as to defendant's financial gain is, as the trial court put it, "the profitability of defendant's misconduct in this state." Tr 25 at 50; *see* ORS 30.925(2)(c).

3. Defendant's "proportionality instruction" made no sense

The portion of defendant's instruction number 34 on which defendant now relies says

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. *Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is*, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

Appendix A at 2 (emphasis added). Defendant now says it wanted the trial court to tell the jury that punitive damages must bear a reasonable relationship to the compensation awarded to Jesse Williams alone. However, the excerpt quoted above plainly also says the jury "may consider the extent of harm suffered by others in determining what that reasonable relationship is ***" Harm to others than plaintiff either may or may not be considered. Defendant's excerpt from instruction number 34 says both that it may and that it may not. The trial court was not required to give a confusing and self-contradictory instruction. In any event, because this part of instruction number 34 told

the jury it could consider harm to others than plaintiff, defendant suffered no prejudice [20] by the trial court's failure to give it.

4. The trial court's instruction on the pleading limits of punitive damages was proper

As this court held in its original decision in this case, "telling the jury the upper limit that the pleadings establish for its verdict is consistent with ordinary Oregon trial practice." 182 Or App at 62, *citing Wiebe v. Seely Administrator*, 215 Or 331, 357 (1959). Indeed, the Oregon Supreme Court has characterized the argument that the jury should not be told the amount prayed for in the pleadings as "untenable." *Haltom v. Fellows*, 157 Or 514, 532 (1937).

Defendant's argument that this long-standing practice should be changed is not based on the Federal Constitution, on anything in *Campbell*, or on anything in Oregon law. Defendant's citations to a law review article and two out of state decisions concerning statutory damage caps are irrelevant. Defendant's Brief at 12-13. The trial court did not err.[17]

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[17] Defendant did not properly preserve a challenge to this alleged instructional error. As this court pointed out, defendant never moved to reduce the punitive damages prayer on the ground that it was impermissibly high. *Williams*, *supra*, 182 Or App at 64. Nor did defendant preserve an objection to the trial court's instruction. When informed that the trial court intended to give the instruction, defendant responded, "Okay." Tr Vol 22-C at 87. Defendant made no substantive argument against the instruction and took no exception after the instructions were given. Tr Vol 25 at 64.

[21]

III. DEFENDANT SUFFERED NO COGNIZABLE PREJUDICE

A. Defendant Misstates the "Harmless Error" Standard

As above, the trial court committed no instructional error. In any event, defendant mischaracterizes the standard of review for harmless error. Defendant argues that it is entitled to reversal if an erroneous instruction "may have affected the outcome of the case." Defendant's Brief at 10, 14, 15 (jury "might well have" awarded less). The Oregon Supreme Court has, however, recently made it clear that the *possibility* of prejudice does not suffice. In *Shoup v. Wal-Mart Stores, Inc.*, 335 Or 164 (2003), the court held under ORS 19.415(2) that trial court decisions will be reversed only where "it can be determined from the record that [an] error 'substantially affect[ed] the rights of a party.'" 335 Or at 174. The party seeking reversal has "the burden to make a record that demonstrates prejudicial error." *Id.* at 173. The court specifically rejected an "outcome might have been different" standard proposed by defendant in *Shoup*. *Id.* Defendant's overheated speculation in this case does not demonstrate prejudicial error under the controlling standard of *Shoup*.

B. Defendant has Failed to Make a Record Establishing that any Error Affected Its Substantial Rights

Defendant complains that plaintiff offered evidence and argument concerning the hundreds of thousands of deaths caused by its cigarettes in the United States annually. Defendant's Brief at 11.

What defendant fails to mention is that it never objected to the evidence on this point. While defendant did not object to argument about total smoking deaths on the question of punitive damages, it did not respond to the trial court's invitation to submit an instruction concerning the concededly appropriate use of that evidence for other purposes at the trial. Tr Vol 24-C at 101 (permissible purposes), 103 (court invites instruction); Tr Vol 25 at 4-26 (no instruction requested). Of course such evidence was perfectly relevant to plaintiff's negligence claim on the issue of foreseeability and to the issue of reprehensibility for purposes of punitive damages. Defendant continues to ignore the obvious point that fraud is more reprehensible when it concerns a product that addicts and kills thousands of consumers than when it causes more conventional harm.

Defendant's continued failure to recognize this is one of the reasons a large punitive damages award is required in this case. Defendant refuses to understand the legitimate relevance of plaintiff's evidence to the extreme reprehensibility of its misconduct. There is a difference between using fraud to profit from injury to an isolated individual and perpetrating a 40-year fraudulent scheme designed to deceive millions, knowing many thousands will die because of it.[18] *Campbell* says nothing to the contrary.

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[18] Defendant argues plaintiff did not prove at trial that anyone other than Mr. Williams succumbed to its fraudulent scheme. Defendant's Brief at 12. That is false. This court held in its initial decision in this case, "defendant's actions caused harm to many others in Oregon besides Williams." 182 Or App at 66-67 (*citing* evidence). As defendant regularly forgets, all the facts and reasonable in-

Similarly, defendant complains that plaintiff asked the jury to punish it simply for selling a deadly, addictive product. Defendant's Brief at 11-12. The sale of cigarettes may be lawful, but defendant has pointed to no jurisdiction in which it may, with impunity, commit fraud.

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ferences must be construed in plaintiff's favor in evaluating this verdict. 182 Or App at 47, *citing Northwest Natural Gas Co. v. Chase Gardens, Inc.*, 328 Or 487, 490-91 (1999).

Excerpts from Williams's Response Brief on the Merits in the Oregon Supreme Court (Mar. 13, 2005)

[P. 31]

* * *

VI. ARGUMENT ON DEFENDANT'S CONTENTIONS OUTSIDE THE SCOPE OF THE COURT'S REMAND

A. *Campbell* does not Require a "Proportionality" Instruction

Defendant's effort to send this case back for another trial based on alleged instructional error is, as explained above, outside the scope of the Supreme Court's remand in *Campbell*. Nothing in *Campbell* requires or suggest that a jury must ever be instructed as to the relationship between punitive and compensatory damages, The only mention of any jury instruction in *Campbell* is the Court's comment that

> [a] jury must be instructed, furthermore, *that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.*

538 U S at 422 (emphasis added).[19]

This mandate has no application to "proportionality." The trial court below specifically instructed the jury to consider only in-state impacts when assessing punitive

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[19] Defendant's assertion that *Campbell* says "juries 'must be instructed' on the factors relevant to their decision-making" does not accurately represent the *Campbell* decision. Defendant's BOM at 6, 13.

damages. Tr Vol 25 at 49-51. And, of course, there is this further distinction: Fraud is illegal in every state.

[32] The jury instruction mentioned in *Campbell* bears no relationship to the "proportionality" instruction requested by Philip Morris at the trial of this matter. There is no case law, and nothing in *Campbell*, to support the notion that due process requires a "proportionality" instruction as a predicate for a jury verdict for punitive damages.

Even in *Campbell*, the Supreme Court's discussion of a jury instruction concerning out-of-state conduct did not lead to a remand for a new trial—the remedy defendant seeks here. Instead, the case was sent back to Utah for "proper calculation of punitive damages" by the state court. *Campbell*, 538 U S at 429. On remand, the Utah Supreme Court recognized that they "had been granted discretion to determine the amount of punitive damages" and conducted judicial review. *Campbell II*, 98 P3d at 412. There was no new trial, there was no new jury instruction, and the Supreme Court denied certiorari when it was asked to consider whether Utah had complied with *Campbell*. *State Farm v. Campbell*, 125 S. Ct. 114 (2004). If no new trial was required on the issue of extraterritoriality in *Campbell*, *a fortiori*, no new trial is required in this case to instruct a new jury on "proportionality."

B. Defendant's Requested Instruction Number 34 was Flatly Self-Contradictory and Wrong on the Law

The Court of Appeals properly noted that defendant's instruction number 34, which included, among other things, language concerning "proportionality," was "confusing." In fact the proposed instruction squarely contradicted itself on the very point defendant now ar-

gues. The Court of Appeals noted that defendant's proposed instruction

> [33] informed the jury both that it *may* consider the harm to others in determining the reasonable relationship of its award to the harm caused to Williams and that it *may not* punish defendant for the impact of its misconduct on others.

193 Or App at 557 n.6 (emphasis by the court). Defendant argues this is wrong because its instruction told the jury that it "may consider harms to others in assessing the reprehensibility of the instant offense but may not punish for alleged harm to others." Defendant's BOM at 21. That is not an accurate characterization of defendant's requested instruction. That requested instruction said, in relevant part:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others *in determining what that reasonable relationship is*, you are not to punish defendant for the impact of its alleged misconduct on other persons ***

Defendant's Requested Jury Instruction No. 34, page 2-3, Plaintiffs Excerpt of Record in the Court of Appeals at ER 4-5 (emphasis added). The language of the requested instruction plainly told the jury they could consider the extent of harm suffered by victims other than plaintiff in determining the reasonable relationship of punitive to actual damages, not, as defendant now contends, in assessing reprehensibility. Thus, even if the court were to credit defendant's erroneous argument concerning harm to others, defen-

dant's requested instruction at trial plainly contradicted the position defendant now takes.

Defendant's instruction number 34 was also inappropriate in other respects. For example, it would have told the jury not to be "influenced by the defendant's financial [34] condition ***" Defendants Requested Jury Instruction No. 34 at 2; Plaintiff's Excerpt of Record at ER 4. A defendant's financial condition is explicitly made relevant to punitive damages by ORS 30.925(2)(f), and the Supreme Court in *Campbell* clearly noted that, while wealth must be treated with care so as not to inflate improperly a punitive damages award, this "does not make its use unlawful or inappropriate." *Campbell* at 428, 123 S Ct at 1525 *quoting Gore*, *supra*, 517 U S at 591 (Breyer, J., concurring).

In Oregon, a trial court need not give an instruction that contains errors of law. *Simpson v. Sisters of Charity*, 284 Or 547, 560 (1978). The trial court did not err in declining Defendant's Requested Jury Instruction No. 34.

C. Defendant Never Assigned Error to the Trial Court's Giving of a Modified Version of Plaintiff's Requested Jury Instruction No. 34

Defendant now presents for the first time an argument that, even if its requested instruction number 34 on punitive damages was properly rejected, this court should require a retrial because the trial court gave plaintiff's punitive damages instruction over defendant's objection at trial. Defendant's BOM at 13-14, 19. The difficulty with this assertion, aside from its error on the merits, is that defendant never assigned error to the trial court's giving of plaintiff's punitive damage instruction.

ORAP 5.45(1) provides, in relevant part:

> No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court *and is assigned as error in the opening brief in accordance with this* [35] *rule*, provided that the appellate court may consider an error of law apparent on the face of the record.

(emphasis added). Each assignment of error must "identify precisely the legal, procedural, factual, or other ruling that is being challenged." ORAP 5.45(3). Further, each assignment of error must demonstrate the raising and preservation of the error in the lower court. *Id.*, subsection (4)(a). In its Cross-Appellant's Brief in the Court of Appeals, defendant complied with these requirements as to the trial court's refusal to give Defendant's Requested Jury Instruction No. 34. Red Brief at 44-45. However, defendant never identified any of the trial court's rulings with respect to plaintiff's requested punitive damages instruction, nor did it demonstrate in its Red Brief the preservation of any alleged error with respect to the trial court's giving of that instruction. *Id.* at 44-49.

Defendant's argument that the defects in it own requested instruction are irrelevant because it objected to plaintiff's instruction should be rejected. To preserve any challenge to plaintiff's requested instruction, defendant was required to assign error in its opening brief in the Court of Appeals in November 2000. Defendant

cannot raise that issue for the first time now, more than four years later.[20]

[36] Defendant further presents the remarkable contention that the self-contradictory nature of its requested punitive damages instruction now makes no difference because plaintiff did not attack that instruction as "confusing" in the trial court. Defendant's BOM at 20-21. Of course this argument is directed at a footnote by the Court of Appeals. 193 Or App at 557 n.6. The fact is defendant's requested instruction was not merely "confusing." It stated a proposition directly contradictory to defendant's current position on this appeal: It told the jury it could consider harm to victims other than plaintiff on the question of the reasonable relationship between punitive and compensatory damages.[21] *Compare* Defendant's BOM at 15 ("may

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[20] Defendant cites *State v. George*, 337 Or 329, 97 P3d 656, 660 (2004) for the proposition that, although its own requested instruction was incorrect, the trial court was nevertheless required to give an instruction conveying its meaning. Defendant's BOM at 19. *George*, however, was an aggravated murder case with a specifically applicable statute concerning the treatment of defendants found guilty except for insanity. This court's decision in *George* is limited to that statute and that factual situation.

[21] This court held in *Outdoor Media Dimensions Inc. v. State*, 331 Or 634 (2001) that the rule of "right for the wrong reason" will be applied only to alternative bases for affirmance that are supported by the existing factual record. That is, a decision will not be affirmed on an alternative ground that was not argued below where the making of such an argument could have allowed the losing party to introduce different evidence. The Court of Appeals has suggested that this rationale might extend beyond questions concerning de-

consider the extent of harm suffered by others in determining what that reasonable relationship is") *with* Defendant's BOM at 21 ("may consider harms to others in assessing the reprehensibility of the instant offense"). Defendant's five page attack on the Court of Appeals' footnote 6 is futile. Defendant cannot sow error in the record with an instruction that contradicts itself then gain a new trial by arguing that plaintiff should have insisted on clarifying defendant's erroneous instruction at trial. Defendant's requested punitive damages [37] instruction was defective in all of the ways described above, and the trial court did not err in refusing to give it.

D. The Jury's Fraud Verdict is Supported by the Evidence

The Supreme Court remanded this case for reconsideration in light of its decision in *Campbell*. Nothing in *Campbell* has anything to do with common law fraud. This court has once denied review of the question of the sufficiency of evidence of fraud, and there is no reason on the *Campbell* remand to reassess that denial.

In any event, defendant cannot now reargue its jury case. The question is simply whether there was any evidence to support the jury's verdict, and plainly there was. *E.g.*, *Bolt v. Influence*, 333 Or 572, 578 (2002). Jesse Williams told his wife he had seen

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velopment of the factual record to arguments concerning jury instructions. *Beall Transport Equipment Co. v. Southern Pacific Transportation*, 186 Or App 696, 705 (2003); *State v. Averitt*, 187 Or App 486, 493 (2003). This court has yet to decide whether to extend the rule of *Outdoor Media* that far. As above, it is unnecessary to consider that question in this case.

statements on television that "tobacco doesn't cause you cancer," and he found written materials to show his family to counter the charge that smoking and lung cancer were related. Tr Vol 12-B at 50, 80. When he was diagnosed with lung cancer, he told his wife he had been "deceived" and "betrayed" and that defendant had been "lying all the time" about the relationship between smoking and cancer. Tr Vol 12-B at 85. And, of course, Philip Morris admitted in its initial reply brief in the Court of Appeals that Jesse Williams was one of "those who clung to Philip Morris' few public statements related to smoking and cancer." Defendant's June 2001 Reply Brief at 13.

Excerpts From Williams's Brief in the Oregon Supreme Court on Remand From the United States Supreme Court (July 3, 2007)

[P. 9]

* * *

A. The trial court properly instructed the jury

The trial court properly instructed the jury under Oregon law, and those instructions did not pose "an unreasonable and unnecessary risk" that the jury would punish the defendant for harm to others or use improper considerations in assessing punitive damages. Using the Oregon punitive damages statutory language, the trial court told the jury:

> In order for you to award punitive damages against the defendant, plaintiff must show by clear and convincing evidence that the defendant, in engaging in the conduct which was a cause of damage to the plaintiff, showed a reckless and outrageous indifference to a highly unreasonable risk of harm and acted with a conscious indifference to the health, safety and welfare of others.

Tr. Vol. 25 at 49-50, *quoting* ORS 31.730 (emphasis added). Thus the court told the jury to consider the defendant's attitude toward risk to the "health, safety and welfare of others" in deciding whether to award punitive damages. Such an instruction does not suggest that the jury impose punishment for harm to others but instead properly focuses the jury's attention on the egregiousness and repre-

hensibility of the defendant's misconduct—defendant's indifference to the substantial risk of harm to the general public. 127 S.Ct. at 1064 (proper to show that "conduct that [10] harmed the plaintiff also posed a substantial risk of harm to the general public").

White stating the punishment and deterrence purposes of punitive damages in its jury instructions, the trial court continued:

> Punitive damages are awarded against a defendant to punish misconduct and to deter misconduct by defendant and others similarly situated. *Punitive damages are not intended to compensate the plaintiff* ***or anyone else*** *for damages caused by the defendant's conduct.*

Tr. Vol. 25 at 50 (emphasis added). This portion of the instruction covers precisely the issue that the Supreme Court emphasized as its first concern about the misuse of harm to others. The Court made clear that its due process reasoning was based substantially on the idea that "a defendant threatened with punishment for injuring a nonparty has no opportunity to defend *** by showing *** the other victim was not entitled to damages." 127 S.Ct. at 1063. Thus the Court suggested that punitive damages may not be assessed by multiplying the compensatory damages awarded by the number of defendant's other victims. *Id.* The trial court's instruction covers the same ground by telling the jury it is not to award punitive damages to compensate for damage caused to "anyone else" and thus addresses the Court's concern about defen-

dant's inability to contest whether nonparties "are entitled to damages".

[11] In line with this concern, the trial court emphasized that punitive damages punish for misconduct. There is a qualitative difference between punishing for misconduct and punishing for harm. The Supreme Court addressed this court's conundrum—"[i]f a jury cannot punish for the *conduct*, then it is difficult to see why it may consider it at all"—explaining that harm to nonparties may be considered as to the reprehensibility of misconduct, but may not be "punished for". *Id.* at 1064-65, *quoting* 340 Or at 52 n.3 (emphasis added). The jury may punish for misconduct; it may not punish for harm. "Punishment for harm" suggests that the punitive damage award is multiplied by uncompensated harms that may not exist or to which there may be valid defenses. Punishment for *misconduct*, however, assesses punitive damages because of the enormity of defendant's offense where, as here, a massive fraud was "brilliantly conceived and executed" to maintain a profitable line of business that defendant knew had killed and injured thousands of its customers. Pl. Ex. 83 at 1. Thus, if the jury is to consider harm to others, it is not to "punish for" that *harm* but rather to punish for defendant's *misconduct*, the reprehensibility of which is tested by the factors set forth in the Oregon statute, including the probability, scope and seriousness of the harm threatened. As above, the [12] trial court properly told the jury that punitive damages are "to punish misconduct". Tr. Vol. 25 at 50.

The trial court instructed under the Oregon punitive damages statute as follows:

> The amount of punitive damages, if any, shall be determined and assessed based upon the following factors: First, the *likelihood at the time that serious harm would arise in this state from the defendant's misconduct; second, the degree of the defendant's awareness of that likelihood*, third, the profitability of the defendants misconduct in this state; fourth, the duration of the misconduct and any concealment of it; fifth, the attitude and conduct of the defendant upon discovery of the misconduct; and, fourth [sic, "sixth"], the financial condition of the defendant.

Tr. Vol. 25 at 50, quoting ORS 30.925(2) (emphasis added). The first two factors—likelihood of serious harm and defendant's awareness of that likelihood—again invoke the proper consideration of harm to others on the question of reprehensibility. The fact of widespread past harm to others demonstrates a likelihood that such harm will recur in the future, and defendant's awareness of that likelihood tends to show defendant's misconduct to be more reprehensible. *Cf.* 127 S.Ct. at 1064 ("conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.") There was no suggestion in the trial court's instructions that the jury may punish defendant "for harm to others". Rather, the jury was told to consider the *risk* of widespread [13] harm and defendant's knowledge of that risk, both of which are relevant to the reprehensibility of defendant's misconduct. None of the other statutory

factors remotely implicates "punishment for harm to others".[22]

The Oregon statutory factors the trial court used to instruct the jury are exclusive. They tell the jury what criteria shall be used for the determination and assessment of punitive damages, and they do not allow the jury to use any other factor.

With each of its jury instructions on punitive damages, the trial court delivered a consistent and constitutionally proper message — the jury was to award punitive damages, if at all, to punish defendant's misconduct. The court offered no suggestion that defendant should be "punished for harm to others" and affirmatively guarded against such punishment by instructing the jury not to assess punitive damages on the basis of compensation for harm that might be due Jesse Williams "or anyone else". Rather, it was the *likelihood* of harm to others and the defendant's disregard of the public health and welfare that the jury was told to consider in assessing the [14] reprehensibility of defendant's misconduct. Again, in the Supreme Court's words,

> [e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.

127 S.Ct. at 1064. To the extent that there was evidence of harm to others in the record, the trial

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[22] As Justice Stevens noted at oral argument, the Oregon statutory factors, as instructed by the trial court, do not allow punishment for harm to others. ER-45.

court instructed the jury as to the purpose for which they could use that evidence, and that purpose was proper. Oregon complied with the Supreme Court's requirements and did not "deprive [this jury] of proper legal guidance." *Id.* The trial court's instructions provided "assurance that [the jurors were] not asking the wrong question." *Id.* They focused the jury on reprehensibility—the risk of harm, and defendant's awareness of that risk.[23]

The jury is presumed to have followed the court's instructions. *E.g. DeJong v. Yu Enterprises*, 334 Or 166, 174 (2002), citing *State v. Thompson*, 328 Or 248, 271 (1999) (jury presumed to have followed instructions where defendant has not shown otherwise). It is therefore presumed that the jury, following the court's instructions, considered harm to others, if at all, for the purpose of evaluating the likelihood that serious harm would arise in [15] this state and defendant's awareness of that likelihood. That is all the court's instructions allowed them to do. Tr. Vol. 25 at 50).[24] Following those instructions,

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[23] Defendant did not preserve any objection to the giving of plaintiff's requested punitive damages jury instructions, quoted above, because defendant never assigned the giving of those instructions as error on appeal. 340 Or at 54.

[24] The trial court did not allow any argument as to the number of defendant's victims in Oregon, limiting plaintiff to the "likelihood of harm" and defendant's profit "in this state". Tr. Vol. 22-C at 83-84. Of course the trial court instructed the jury to base its verdict on the evidence, not on the arguments of counsel. Tr. Vol. 3-A at 16; Tr. Vol.

the jury punished defendant for the extreme reprehensibility of its misconduct. It did not "punish defendant directly on account of harms it is alleged to have visited on nonparties". 127 S.Ct. at 1064.

B. The trial court did not err in refusing defendant's proposed jury instruction No. 34

Defendant complains that the trial court should have given its jury instruction request No. 34, a four-page amalgam of argument, legal error and self-contradiction which the trial court properly rejected on several grounds.[25] ER-1–ER-4. Of course an Oregon trial court commits no error in refusing a proposed jury instruction "if the requested instruction is not correct in all respects". *Hernandez v. Barbo Machinery*, 327 Or 99, 106 [16] (1998). Defendant's No. 34 was incorrect in at least the following respects.[26]

23-A at 110. There was no evidence of the number of defendant's victims in Oregon. Tr. Vol. 23-B at 84-85.

[25] At oral argument, Justice Souter, who voted with the five-Justice majority above, called defendant's No. 34 "probably an unsound request" and said "I have great difficulty in seeing how I could find that it was error to refuse to give the instruction." E-11–ER-12.

[26] The trial court refused to give defendant's No. 34 for several reasons, including that parts of it were covered by other instructions, that parts were argumentative comments on the evidence and that parts simply misstated the law. Tr. Vol. 22-C at 76 ("we have already told the jury that punitive damages are not compensatory damages."); *id.* at 79 (argumentative); *id.* at 80 (comment on evidence); *id.* at 85 (argumentative, com-

1. The core language on which defendant relies misstates the law

Many of the legal misstatements that infect defendant's No. 34 appear in other parts of this long instruction request, but the most serious flaw is in the central language on which defendant relies:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although *you may consider the extent of harm suffered by others in determining what that reasonable relationship is* you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

ER-2–ER-3 (emphasis added). As above, the punitive damages calculus first [17] set out in *Gore*, and reaffirmed by the Supreme Court in this case considers (1) the reprehensibility of defendant's misconduct;

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ment on evidence, misstates law regarding relevance of defendant's profit). That ruling should be upheld if it is right for any of the reasons described here, whether or not relied on by the trial court. *See, e.g., Outdoor Media Dimensions, Inc.* v. *State*, 331 Or 634, 659-60 (2001) ("right for the wrong reason" doctrine). Plaintiff believes the trial court's grounds for rejecting defendant's No. 34 were proper, but that the additional grounds described here provide additional justification directly relevant to the Supreme Court's holding in this case.

(2) the "ratio" or reasonable relationship of punitive damages to actual and potential harm to plaintiff; and (3) comparable penalties. 538 U.S. at 418. The Supreme Court has made clear in this case that harm to others is properly relevant to the first factor—reprehensibility. 127 S.Ct. at 1064. However, that is not what defendant's No. 34 says. The proposed instruction would make harm to others relevant to deciding the "reasonable relationship" between punitive damages and harm to plaintiff—the second *Gore* factor, which deals with proportionality. As this court held in its last opinion in this case and the Supreme Court has now acknowledged, it is clear that the only harm relevant to the "reasonable relationship" factor is the harm or potential harm to plaintiff. 340 Or at 61-62, *citing Campbell, supra*, 538 US at 425, 426 (2003). *See also* 127 S.Ct. at 1063. Harm to others may not be considered in deciding the reasonable relationship between punitive damages and harm or potential harm, and defendant's No. 34, which states just the contrary, was plainly wrong on the central point for which defendant seems to have offered it. [27]

[18] Indeed, to consider harm to others in deciding the reasonable relationship—the "ratio"—between punitive damages and actual and poten-

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[27] In the Supreme Court, Philip Morris conceded that the concept it was attempting to convey may be "elusive", Petitioner's Brief on Certiorari at 23, and that its request No. 34 "could be edited up to be a little sharper", ER-22–ER-23, but in fact, as above, defendant's No. 34 was dead wrong on the law.

tial harm is precisely to "punish for harm to others" because it suggests multiplying the "ratio" according to the number of defendant's victims.[28] As above, and as this court recognized in its last decision, that is not permitted. 340 Or at 61.

Further, defendant's No. 34 erroneously and confusingly suggests that other juries may "award punitive damages for *** harms" to others than plaintiff. Again, as above, punitive damage awards are not intended to "punish for harm"; they punish for misconduct. Compensation is for harm; punishment is for misconduct. Maintaining that distinction, as the trial court did, is crucial to keeping the jury on the right side of the line the Supreme Court drew in this case. The trial court properly rejected defendant's No. 34.

2. Defendant's No. 34 would have encouraged the jury to punish for harm to others

The last sentence of defendant's request No. 34 also contradicts the [19] Supreme Court's holding in this case. In discussing the relevance of defendant's financial condition to the amount of punitive damages, request No. 34 says:

> Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment.

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[28] As the Chief Justice, who voted with the five-Justice majority, suggested at oral argument in the Supreme Court, increasing the "ratio" because of harm to others is tantamount to "punishing the defendant for harm to others." ER-15.

> However, you may not punish the defendant simply because it is large. Rather the paramount consideration remains the degree of reprehensibility of any misconduct *and the extent of any harm caused by such misconduct.*

ER-4 (emphasis added). Plaintiff agrees that the reprehensibility of defendant's misconduct is the most important consideration for the jury in deciding the amount of punitive damages.[29] However, to say that the other "paramount consideration",[30] in addition to reprehensibility, is "the extent of any harm caused" by defendant's misconduct is to suggest the opposite of what the Supreme Court has just held in this case. It is to suggest that the jury should consider any harm defendant has caused, including harm to others than plaintiff, not just to decide reprehensibility but generally, "as [20] part of the process of arriving at an appropriate punishment". By making harm to others a consideration independent of reprehensibility, defendant's No. 34 would have created a risk that the jury might punish defendant "directly for harms

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[29] This is not the same as to say, as the Supreme Court repeatedly has, that, *for purposes of judicial review*, reprehensibility is the most important indicium of the reasonableness of a punitive damages award.

[30] It is difficult not to notice in the phrase "paramount consideration" an echo of defendant's first widely published misrepresentation, the "Frank Statement to Cigarette Smokers", a 1954 newspaper broadside, in which defendant and other tobacco companies claimed: "We accept an interest in people's health as a basic responsibility, *paramount to every other consideration* in our business". Pl Ex. 5 (emphasis added).

it is alleged to have visited on nonparties." 127 S.Ct. at 1064. That would squarely violate the Supreme Courts holding in this case. The trial court did not err in refusing to give this requested instruction.

3. Defendant's No. 34 erroneously ties the amount of punitive damages to the extent of public knowledge

Defendant's No. 34 included the following:

> In considering punitive damages, I remind you that the sale of cigarettes has in itself been at all times a lawful activity in this State. You are not to punish the defendant on account of the propensity of cigarettes to cause illness and death for some of those who smoke them, or the defendant's knowledge of that propensity, except to the extent that the risks from smoking were not a matter of general public knowledge but were known to and unlawfully misrepresented by the defendant.

ER-2 (emphasis added). In suggesting that the jury punish defendant "to the extent that the risks from smoking were not a matter of general public knowledge", defendant sought to introduce an idea that was not only unprecedented and confusing, but wrong in a way that would have contradicted the very idea on which defendant now relies. The instruction says, in effect, "You are not to punish defendant because cigarettes are [21] dangerous *except* to the extent that defendant tied about the danger and the danger was unknown"; that is, "You may punish for harm to others to the extent that they were misled about the dangers of cigarettes." Thus, defendant's No. 34 would have asked the jury to

assess punishment to the extent that nonparties were defrauded—to punish for harm to others. That is exactly what the Supreme Court has just prohibited.

Further, this part of defendant's No. 34 would have allowed punitive damages only on plaintiff's fraud claim. The claim for negligence would also have supported punitive damages, though the jury did not ultimately award punitive damages on the negligence claim. 340 Or at 44. There was no legal ground for limiting punitive damages to the fraud claim in instructing the jury, but that is just what this part of defendant's No. 34 would have done by allowing an award of punitive damages only to the "extent that the risks from smoking were *** unlawfully misrepresented by the defendant."

An Oregon trial court must give properly requested jury instructions if they "correctly state the law, are based on the current pleadings in the case, and are supported by evidence." *Hernandez*, 327 Or at 106 (citing cases). Because this part of defendant's No. 34 would have barred punitive damages on plaintiffs' negligence claim, it was not based on the pleadings [22] and evidence, and the trial court properly declined to give it.

4. The trial court gave defendant's "alternative" request, so defendant cannot claim error

Defendant's No. 34 included four numbered paragraphs purporting to cover the subject of the amount of punitive damages. ER-1–ER-4. The first of these, numbered "(1)", is the part on which defendant has focused in these appeals. However, immediately following that paragraph, defendant added

the headline "[ALTERNATIVE]" above another paragraph "(1)" that read, "(1) You are not to punish the defendant for the impact of its conduct on individuals in other states." *Id.* at ER-3 (emphasis added).[31] The trial courts instructions to the jury in fact conveyed exactly this principle.

While, as above, the trial court's instructions told the jury to punish defendant for its misconduct, not for "harm" or "impact", it is certainly clear that, where appropriate, what the trial court said in its instructions was also limited by the phrase "in this state". Tr. Vol. 25 at 50 ("the likelihood at the time that serious harm would arise *in this state* from the defendants misconduct"; "profitability of the defendant's misconduct *in this state*" (emphasis added)). Thus the trial court covered defendant's "Alternative" paragraph (1), in substance and no more was required. [23] *Hernandez*, 327 Or at 106 ("There also is no error by the trial court if the substance of the requested jury instruction, even if correct, was covered fully by other jury instructions given by the trial court."). Because the court covered defendant's requested "Alternative", defendant preserved no objection to the court's decision not to give its first paragraph (1). The trial court committed no error.

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[31] As is apparent from a review of defendant's request No. 34, ER-1–ER-4, the "[ALTERNATIVE]" offered by defendant was an alternate paragraph "(1)", not an entire alternate instruction.

5. Defendant's request No. 34 misstated the "profit" factor

ORS 30.925(2)(c) provides that one of the criteria on which the fact finder is to base its determination and award of punitive damages is "the profitability of the defendant's misconduct". In its request No. 34, Philip Morris asked the court to tell the jury it could base its determination of reprehensibility on "the degree to which the defendant was *motivated* by a desire to obtain *illicit profits* from its misconduct". ER-3 (emphasis added). The statutory factor is "profitability". It is not "motive to profit", and the addition of the modifier "illicit" is argumentative and legally erroneous. The trial court specifically declined defendant's No. 34, among other reasons, because "it doesn't have to be illicit profit. It could be legal profit." Tr. Vol. 22-C at 85. Defendant has never demonstrated or even argued otherwise. The trial court properly rejected defendant's No. 34 for this reason alone.

[24] In addition, the "profitability" factor in this statutory formulation legitimately includes a policy — to make defendant disgorge the fruits of its misconduct. *Williams v. Philip Morris*, 193 Or App 527, 563 (2004). That need has nothing to do with, and is certainly not defined by, defendant's motivation. For this additional reason, defendant's No. 34 misstated the law, and the trial court properly rejected it.

6. Defendant's No. 34 misstated the relevance of the Oregon statutory factors

By statute, punitive damages, if any, "shall be determined and awarded based upon" specific criteria. ORS 30.925(2) (emphasis added). Those

criteria are limited to the likelihood of harm, defendant's knowledge, profitability of misconduct and the other familiar factors. The statute is mandatory, providing the criteria on which the determination and award of punitive damages "shall be" based. Defendant's No. 34 proposed making that mandatory language permissive:

> The size of the punishment *may* appropriately reflect the degree of reprehensibility of the defendant's conduct — that is, how far the defendant has departed from accepted societal norms of conduct. Factors that *you may find to bear* upon the degree of reprehensibility *include* *** [listing factors]

ER-3 (emphasis added). Nothing in the Supreme Court's decision in this case or in any other relevant authority would justify loosening the statutory requirements by adding to the jury's discretion in this way. The statute [25] says "shall"; defendant's No 34 said "may", and the trial court properly refused to give it.

Further, the statutory listing of factors on which the determination and award of punitive damages must be based is exclusive. The list of seven factors in ORS 30.925(2) does not allow the jury to consider other, unspecified considerations in its discretion. Defendant's No. 34, on the other hand, would have told the jury the factors they "may find to bear upon the degree of reprehensibility *include*" those listed, suggesting that the jury might wish to consider other, unspoken criteria. To allow the jury such arbitrary leeway would not only have been error under ORS 30.925; it should also have piqued the Supreme Court's concern with

"'arbitrary punishments,' i.e., punishments that reflect not an 'application of law' but 'a decision-maker's caprice'". 127 S.Ct. at 1062, *quoting Campbell, supra*, 538 U.S. at 416, 418. The Oregon statute provides what the Supreme Court would require — "proper standards that will cabin the jury's discretionary authority",[32] and those standards are exclusive and mandatory. To make those standards mere suggestions, as defendant's request No. 34 would have done, would have been error. Defendant's No. 34 was not a correct statement of Oregon statutory law; it would have introduced the kind of [26] arbitrariness the Due Process Clause prohibits, and the trial court properly rejected it.

7. An Oregon trial court need not give a "harm to others" instruction absent proper request

Defendant may argue that, though its request No. 34 included numerous errors, the trial court should nevertheless have "edited it up"[33] to preserve its proper parts or at least have given some version of a "harm to others" instruction. Any such argument should be rejected. As above, the law in Oregon is that a trial court need not give a requested jury instruction unless it is "correct in all respects". *Hernandez*, 327 Or at 106. Indeed, defense counsel recognized the applicability of this rule at oral argument in the Supreme Court:

> [T]here's always a danger when you add words to an instruction that you will add

---

[32] 127 S.Ct. at 1062.

[33] ER-22–ER-23 (oral argument of defense counsel).

> something that a court will find was incorrect and therefore deny the instruction, ***

ER-10.

Nothing in federal due process jurisprudence requires Oregon to abandon its standard procedural requirements for the adjudication of cases, including its rules about the adequacy of proposed jury instructions. The Supreme Court has balanced, as a matter of both comity and federalism, respect for state rules of procedure and an assurance that such rules do not

Excerpts From Transcript of Proceedings on Remand in the Oregon Supreme Court (Sept. 11, 2007)

[Tr. 16] requirement, such as the requirement that you request an instruction is an adequate state ground for denying relief, is qualified.

The Court—the Supreme Court will defer to state court procedural rules, so long as the rules are consistently applied, and so long as they serve a legitimate state purpose. I think that's exactly consistent with what this Court has said in its own preservation rulings; that is, in *George* you recognize the application of the correct-in-all-respects rule would not make any sense in terms of the purposes that preservation is designed to serve—

JUSTICE GILLETTE: Our interpretation as to whether *George* is binding, useful or irrelevant, however, is an interpretation which, given any of those three possibilities, the United States Supreme Court wouldn't care about for one second. That is to say, it assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on the *George*, for the Court to assume anything different nor for you to claim anything different, Mr. Gary.

MR. GARY: I can't really say that I agree with that until I see what the Court has to say. But of course the Supreme Court has presumed that this Court acted in good faith, as do we—

* * *

CERTIORARI GRANTED

SUPREME COURT OF THE UNITED STATES

07-1216

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

June 9, 2008

Petition for writ of certiorari to the Supreme Court of Oregon granted limited to Question 1 presented by the petition.

PETITIONER'S BRIEF

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PHILIP MORRIS USA,

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v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to The Supreme Court of Oregon

BRIEF FOR THE PETITIONER

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
SCOTT A. CHESIN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
(Additional counsel listed on inside cover)

101
08275

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

QUESTION PRESENTED

When this case was last before it, this Court ruled that due process precludes a jury from imposing punitive damages to punish for alleged injuries to persons other than the plaintiff. The Court remanded the case to the Oregon Supreme Court with directions to "apply the standard we have set forth." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007). On remand, however, the Oregon court failed to follow this Court's directive. Instead, it "adhered to" the judgment this Court had vacated, holding that Philip Morris had procedurally defaulted under state law and thereby forfeited its claim of constitutional error.

The question presented is:

Whether, after this Court has adjudicated the merits of a party's federal constitutional claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may instead hold the federal claim forfeited by interposing a state-law procedural rule in a way that serves no legitimate state interest and is neither firmly established nor regularly followed.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly-held company that owns ten percent or more of Philip Morris USA's stock.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Oregon Supreme Court (Pet. App. 1a-25a) is reported at 176 P.3d 1255. That court's earlier decision (Pet. App. 26a-66a) is reported at 127 P.3d 1165. The 2004 decision of the Oregon Court of Appeals (Pet. App. 67a-114a) is reported at 92 P.3d 126, and the 2002 decision of that court (Pet. App. 115a-154a) is reported at 48 P.3d 824. The trial court's oral ruling on Philip Morris's proposed instruction (Pet. App. 155a-165a) is unreported.

JURISDICTION

The decision of the Oregon Supreme Court was entered on January 31, 2008. The petition for a writ of certiorari was filed on March 24, 2008, and granted on June 9, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATEMENT

In *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007), this Court held that due process requires a trial court, upon request, to protect a defendant against the risk that a jury will punish it for injuries to persons not before the court. This Court observed that, during the trial of this case, Philip Morris had requested protection against that risk, but the Oregon courts rejected this request on the ground that punishment for harms to non-parties is constitutionally permissible. *Id.* at 1061, 1062. Finding that constitutional ruling erroneous, this Court "remand[ed] this case so that the Oregon Su-

preme Court can apply the standard we have set forth." *Id.* at 1065.

On remand, however, the Oregon Supreme Court failed to follow this direction. Instead, it held that Philip Morris had forfeited the federal right recognized by this Court because it had not complied with a state-law procedural requirement that had never before been invoked by any Oregon court in this case during nine years of appellate litigation.

The Oregon Supreme Court was not free to disregard this Court's express directive to apply the federal constitutional principle that it announced. Nor did it have the power to re-examine on remand this Court's premise that the federal question was properly before it. Moreover, the waiver theory asserted by the Oregon Supreme Court on remand is in any event not an adequate ground for refusing to entertain Philip Morris's federal claim. As applied in a case such as this one, the rule serves no legitimate purpose. It has never been applied under circumstances remotely like those presented here, and appears to be nothing more than a pretext for refusal to protect Philip Morris's due process rights. Reversal is required to protect litigants' federal constitutional rights, the integrity of the federal system, and judicial economy in this Court's resolution of constitutional issues.

A. The Trial

Jesse Williams began smoking cigarettes in 1950. Pet. App. 5a. After 1955, Williams smoked Marlboros, which are manufactured and marketed by Philip Morris. *Id.* at 29a. Williams eventually smoked three packs of cigarettes a day. He was diagnosed with cancer in 1996 and died in March 1997.

Ibid. Alleging negligence, strict product liability, and fraud, Williams's widow sued Philip Morris.

At trial, plaintiff mounted a wide-ranging attack on Philip Morris's conduct over a period of 50 years. In closing arguments, plaintiff urged the jury to punish Philip Morris not only for the harm caused to Williams but also for unidentified harms suffered by countless other, unidentified Oregon smokers who were not before the court and whose individual circumstances were never presented to the finder of fact. 127 S. Ct. at 1061, 1063.

Philip Morris submitted a proposed jury instruction covering the subject of punitive damages (Requested Instruction 34) which, in a separately numbered paragraph, would have told the jury "not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims." J.A. 32a-33a.[1] At the charge conference, the trial court engaged in what the Oregon Supreme Court called a "line-by-line" analysis of Philip Morris's proposed charge, Pet. App. at 16a, and addressed the instruction on harms to non-parties as a

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[1] The full paragraph, addressing proportionality and harms to non-parties, stated:

> (1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

J.A. 32a-33a.

distinct issue. Philip Morris argued that the instruction was required by the federal Constitution. J.A. 12a-20a. The trial court, however, ruled that an instruction forbidding punishment for harm to non-parties was *not* constitutionally required and, accordingly, declined to give the requested instruction. *Id.* at 20a.

Plaintiff voluntarily dismissed her strict product liability claim, and the jury found for her on her fraud and negligence claims. It awarded $821,485 in compensatory damages (reduced to $521,485 pursuant to Oregon's statutory cap on wrongful death damages). The jury also awarded $79.5 million in punitive damages for fraud; it declined to impose punitive damages for the conduct underlying the negligence claims.

On post-trial motions, the trial court held that the punitive damages award was "excessive under federal standards" (Pet. App. 38a) and reduced it to $32 million. Both sides appealed.

B. Initial Appeal And GVR

Philip Morris argued on appeal, *inter alia*, that the jury should have been instructed not to impose punitive damages to punish for harms to non-parties. The Oregon Court of Appeals rejected that contention on the merits. Pet. App. 140a. It further concluded that the jury's verdict was not unconstitutionally excessive and accordingly reinstated the $79.5 million award. *Id.* at 152a, 154a. Including interest, the award now amounts to over $145 million.

After the Oregon Supreme Court denied discretionary review, Philip Morris petitioned this Court for a writ of certiorari, raising both the harms-to-non-parties issue and the excessiveness claim. This

Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), which (i) held that a State may not "award[] punitive damages to punish and deter conduct that [bears] no relation to the [plaintiff's] harm" (*id.* at 422) and (ii) clarified the proper application of the *BMW* guideposts for determining whether a punitive award is excessive. See *Philip Morris USA Inc.* v. *Williams*, 540 U.S. 801 (2003) ("*Williams I*").

C. Proceedings On The First Remand

On remand, the Oregon Court of Appeals ruled that *State Farm* had no impact on its conclusions and again upheld the jury's $79.5 million punitive verdict, principally because of alleged harm Philip Morris caused to unidentified members of the "Oregon public." Pet. App. 112a-113a, 114a. The Court of Appeals once again rejected—on the merits—Philip Morris's argument that the trial court had committed constitutional error by failing to give the proposed instruction barring punishment for harms to non-parties. The court held that punishment on that basis was entirely appropriate under the federal Constitution. *Id.* at 102a-105a.

Philip Morris again sought discretionary review from the Oregon Supreme Court. Pet. App. 173a-175a. This time, the Oregon Supreme Court accepted review. In affirming, the Oregon court recognized that there was no evidence that anyone other than Williams had relied on, or been injured as a result of, any of Philip Morris's representations. But it concluded that the jury nevertheless could have found that Philip Morris's conduct affected many smokers other than Williams. *Id.* at 35a; see also *id.*

at 55a. The court based that conclusion on its own "assessment of human nature"—an "assessment" that the court also "attributed" to the jurors. *Id.* at 36a n.1.

The Oregon Supreme Court rejected Philip Morris's argument that the trial court had violated the federal Constitution by failing to instruct the jury not to punish Philip Morris for harms to non-parties.[2] The court held that nothing in this Court's decisions "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harms to non-parties." Pet. App. 48-49a. The Oregon Supreme Court then rejected Philip Morris's excessiveness claim. *Id.* at 54a, 66a.

Philip Morris filed a second petition for certiorari, which this Court granted.

D. This Court's Decision

This Court granted review on two questions: (i) whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties; and (ii) whether the constitutional requirement of a reasonable relationship between punitive and compensatory damages is inapplicable in cases where the jury could have found the defendant's conduct to be

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[2] Far from suggesting that Philip Morris's federal claim had been forfeited, the Oregon Supreme Court gave every indication that the claim of error for failure to give the instruction had been preserved. After considering and rejecting that claim *on the merits*, the court went on to note that Philip Morris had not preserved any *other* challenge based on punishment for harms to non-parties. Pet. App. 51a-52a. In particular, the court refused to consider Philip Morris's separate argument attacking the instructions "actually given," because "Philip Morris did not preserve that argument." *Ibid.*

highly reprehensible. See *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007) ("*Williams II*"). The Court found it necessary to rule only on the first of these questions, holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063.

Having held "explicitly that a jury may not punish for the harm caused others," 127 S. Ct. at 1065, the Court drew a critical distinction that had been anticipated by Philip Morris's proposed instruction: that while a jury may consider harms to non-parties in gauging the reprehensibility of the defendant's misconduct, the jury must *not* "go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. The Court "conclude[d] that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Ibid.* Where the risk of jury confusion is

> a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—*a court, upon request, must protect against that risk.* Although the States have some flexibility to determine what *kind* of procedures they will implement, *federal constitutional law obligates them to*

> *provide some form of protection in appropriate cases.*

Id. at 1065 (emphases added; emphases of "kind" and "some" in original).

The Court also recognized that Philip Morris had requested protection against the risk of punishment for harms to non-parties by proposing an instruction that "distinguishe[d] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." 127 S. Ct. at 1064 (quoting Philip Morris's proposed instruction). The Oregon Supreme Court, like the trial court and the Oregon Court of Appeals before it, had "rejected that claim" on the merits. *Ibid.*

This Court concluded its opinion by telling the Oregon Supreme Court precisely what was to be done on remand:

> As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris's appeal. We remand this case *so that the Oregon Supreme Court can apply the standard* we have set forth.

127 S. Ct. at 1065 (emphasis added). Because application of the proper constitutional standard could lead to either "the need for a new trial, or a change in the level of the punitive damages award," *ibid.*, the Court did not reach the excessiveness question.

Justice Ginsburg's dissent, joined by Justices Scalia and Thomas, asserted that the Court should not have reached the merits of the federal constitutional claim. The dissent stated that Philip Morris

had not "preserve[d] any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument." 127 S. Ct. at 1068. The dissent further suggested that Philip Morris's proposed jury instruction had not been sufficient to preserve its claim of constitutional error. *Id.* at 1069.[3] That view was implicitly rejected by the Court when it addressed Philip Morris's due process claim on the merits.

E. Proceedings On The Second Remand

On remand, the Oregon Supreme Court did not "address the constitutional standard that the United States Supreme Court has articulated" but instead "adhere[d] to" the opinion that this Court had vacated. Pet. App. 13a, 22a. The Oregon court assumed that the portion of the proposed instruction that addressed harms to non-parties "clearly and correctly articulated the standard required by due process" and was therefore correct as a matter of federal law. *Id.* at 21a. Nonetheless, the court held that it did not need to apply that standard, because Philip Morris's proposed jury instruction "was flawed for reasons that we did not identify in our former opinion," *id.* at 3a—reasons that had never been relied upon by either the Oregon Court of Appeals or the Oregon Supreme Court in nine years of appellate litigation, but that the Oregon court now insisted "we must consider, before we address the constitutional standard" articulated by this Court. *Id.* at 13a.

Philip Morris's error, according to the Oregon Supreme Court, was that it submitted its proposed

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[3] Justice Stevens wrote separately, disagreeing with the majority on the merits only. 127 S. Ct. at 1065-67.

instruction on harms to non-parties in the same document that contained other proposed instructions on punitive damages, each presented as a separate paragraph, and that one of the other proposed instructions "did not state [Oregon] law correctly." Pet. App. 21a. That paragraph would have told the jury that it "may," rather than "shall," take into account various statutory factors in awarding punitive damages. It also would have told the jury to consider the extent to which any misconduct by Philip Morris was motivated by "illicit" profits, as opposed to having the jury consider all profits Philip Morris actually received from its sale of cigarettes in Oregon, whether or not arising from tortious activity. *Id.* at 18a-22a.

Those supposed errors had no impact on the trial court's refusal to instruct on harms to non-parties. As the Oregon Supreme Court recognized, the trial judge had "reviewed the proposed jury instructions line-by-line," Pet. App. 16a, and had denied Philip Morris's federal claim on the merits. But the court below nevertheless held that Philip Morris had forfeited its constitutional claim by "placing all the party's eggs in one instructional basket" (*id.* at 15a), and that this forfeiture was "an independent and adequate ground for affirming the trial judge's ruling." *Id.* at 13a.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court has disregarded the instructions of this Court, which held that "the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris's appeal" and remanded the case "so that the Oregon Supreme Court can apply the standard we have set forth." 127 S. Ct. at 1065. The Oregon Supreme Court had no authority to refuse to "apply" the cor-

rect constitutional standard and instead find Philip Morris's federal claim barred by a "preliminary, independent state law standard." Pet. App. 13a. This Court has repeatedly rejected lower courts' attempts to skirt its mandates in this manner. See, *e.g.*, *Stanton* v. *Stanton*, 429 U.S. 501 (1977); *Yates* v. *Aiken*, 484 U.S. 211 (1988).

Even apart from this Court's explicit instruction, it was improper for the Oregon Supreme Court to reexamine a basic premise of this Court's opinion in *Williams II*: the determination that Philip Morris's constitutional claim had been fairly and accurately presented to the trial court and should be addressed on the merits on remand. On both previous occasions leading to remands from this Court, the Oregon courts decided the merits of the federal claim despite plaintiff's repeated arguments that the issue had not been properly preserved. The Oregon Supreme Court was not free to erect a state-law procedural barrier for the first time on remand in order to evade this Court's directions and uphold a judgment that this Court found to be infected by constitutional error. *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240, 243-44 (1959) (per curiam); *Yates*, 484 U.S. at 217.

II. There is a second, independent reason for reversal: the Oregon Supreme Court's rationale for refusing to address Philip Morris's due process claim does not constitute an adequate state ground for the judgment.

Whether a party preserved a constitutional claim is a question of federal law. *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). Although this Court will recognize a state-law procedural bar to a federal claim if the rule is regularly followed and its applica-

tion in the particular case serves legitimate state interests, the Court has repeatedly held that state courts cannot deploy novel or unreasonable rules, or apply otherwise legitimate rules in unreasonable ways, in an effort to thwart constitutional claims. See, *e.g.*, *Osborne* v. *Ohio*, 495 U.S. 103 (1990); *Lee* v. *Kemna*, 534 U.S. 362 (2002). Here, as this Court observed, Philip Morris proposed a jury instruction that correctly stated the federal standard, and also made clear at the charge conference its position on the federal issue. That was sufficient to invoke its constitutional right. The Oregon Supreme Court's novel application of a requirement that the proposed instruction be "correct in all respects"—an application completely divorced from the rule's purpose—reflects the type of "pointless severity" that this Court has held inadequate to bar federal claims. *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964).

The Oregon courts frequently have described the purpose of requiring that a proposed instruction be "correct in all respects" as being to ensure that trial judges are fairly and specifically apprised of parties' requests and to avoid burdening trial judges with the job of rewriting incorrect instructions. The Oregon Supreme Court's extension of this requirement to impose a forfeiture simply because an accurate proposed instruction on federal law appeared on the same page as a supposedly incorrect instruction on a different point of law would not serve the purpose of freeing courts from editing responsibilities. Its only effect would be to force counsel to submit individual requests on separate pages, rather than separating those requests with paragraph indentations.

In this case, moreover, presenting the proposed instruction on harms to non-parties on a separate piece of paper would not have made the slightest difference. The trial court considered each paragraph of Requested Instruction 34 independently, and it rejected the paragraph on harms to non-parties on the merits because it believed, erroneously, that the instruction was not required by federal law. Accordingly, the outcome would have been exactly the same had Philip Morris submitted that paragraph by itself on a separate page. State courts cannot require litigants to engage in "arid ritual[s] of meaningless form" in order to preserve their federal claims. *James* v. *Kentucky*, 466 U.S. 341, 349 (1984); *Osborne* v. *Ohio*, 495 U.S. at 124.

Beyond this, the requirement imposed below is the antithesis of the "firmly established and regularly followed state practice" that can bar a federal claim. *James*, 466 U.S. at 348-49. The Oregon Supreme Court's decision departs markedly from established Oregon law in several ways. First, the Oregon courts had long held that there is no need for counsel to re-submit a proposed instruction in "completely correct" form if it is clear that such a submission would be rejected in any event. *State* v. *George*, 97 P.3d 656 (Or. 2004). Second, this case marks the *first* and *only* time in any reported Oregon decision that an appellate court has rejected an instruction on one subject, considered separately and addressed on the merits by the trial court, simply because it appeared under the same heading as a defective instruction on an entirely distinct point of law. Under the circumstances, Philip Morris lacked fair notice of the procedural requirement it supposedly violated; a party proffering a federal claim may not be ambushed by state courts in this manner. And third, it

has always been Oregon practice to decide questions of state law first, in order to avoid unnecessarily reaching federal constitutional issues. It was therefore implicit in the prior decisions on the merits that there was no state law procedural defect in the presentation of Philip Morris's claim.

III. As this Court recognized, Philip Morris properly requested protection from the risk of punishment for harms to non-parties. And the trial court infringed Philip Morris's federal constitutional rights by rejecting that request. The only adequate remedy for this constitutional violation is a new trial. A remittitur of the punitive award to the maximum amount permissible under the Constitution cannot cure the error, because a properly instructed jury might well have awarded less than the constitutional maximum. The Oregon courts should now be directed to award Philip Morris a new trial.

ARGUMENT

I. THE OREGON SUPREME COURT FAILED TO COMPLY WITH THIS COURT'S DIRECTIONS.

A. The Remand Required The Oregon Courts To "Apply" The Constitutional Standard.

When it failed to "apply the [constitutional] standard set forth" in this Court's decision, the Oregon Supreme Court violated a principle fundamental to the operation of our judicial system: that this Court's decisions must be scrupulously followed by the lower courts. As Justice Jackson explained, from "its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs* v.

Penn. R. Co., 334 U.S. 304, 306 (1948). See also, *e.g.*, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (following a remand from this Court, a lower court is "bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution"); *Ex Parte Sibbald*, 37 U.S. 488, 492 (1838) (same). This Court has not hesitated to reverse lower court rulings that contravene the command of its decisions.

Stanton v. *Stanton*, 429 U.S. 501 (1977) (per curiam) is an example. When the case was first before it, this Court held that a Utah statute that established 21 as the age of majority for males and 18 as the age of majority for females violated the Equal Protection Clause. The Court "did not decide how Utah was to eliminate the discrimination between the genders," and instead "remanded the case to the Utah court for it to resolve this issue of state law." *Id.* at 501.

On remand, however, the Utah Supreme Court "did not consider the issue presented to it and held, instead, that the age-of-majority statute was constitutional as applied to females without considering the discrimination." 429 U.S. at 502. The Utah court's basis for skirting this Court's mandate was similar to the one advanced by the Oregon Supreme Court here: despite having reached the discrimination issue when the case was first before it, the Utah Supreme Court on remand asserted that the federal issue was not properly raised in the case. This Court reversed, rejecting the Utah court's attempt to reaffirm its earlier judgment on new procedural grounds and holding that the decision "obviously[] is inconsistent with our opinion in *Stanton I*." *Id.* at 503.

Similarly, in *Yates* v. *Aiken*, 484 U.S. 211 (1988), the defendant claimed that the trial court's instructions to the jury were erroneous both as a matter of state law and of federal due process. *Id.* at 212. After the South Carolina Supreme Court denied his habeas petition, Yates sought review from this Court, which summarily vacated the judgment and remanded the case for further consideration in light of its recent decision in *Francis* v. *Franklin*, 471 U.S. 307 (1985). On remand, the South Carolina court refused to grant the defendant relief because it believed that none was available under state law; critically, the court "did not consider whether [*Francis*] might apply retroactively" and entitle the defendant to relief under federal law. 484 U.S. at 213. This Court "granted certiorari because [it was] concerned that the South Carolina Supreme Court had not fully complied with [its] mandate," and reversed.

Of particular relevance here, the Court observed that "[o]ur mandate contemplated that the state court would consider whether, as a matter of *federal* law, petitioner's conviction could stand in the light of *Francis*." *Id.* at 215 (emphasis added). This Court went on to decide the question directly: "Since the state court did not decide that question, we shall do so." *Id.* It determined that the jury instructions were erroneous and that the petitioner's constitutional rights had been violated. *Id.* See also *Smith* v. *Texas*, 127 S. Ct. 1686, 1698-99 (2007) (reversing state court's reinstatement of judgment following remand, notwithstanding a new finding of procedural default, because the state court is "required to defer

to our finding" of a constitutional error in the jury charge).[4]

Decisions like these make clear that this Court will not condone the failure—whether intentional or merely erroneous—of lower courts to comply with the Court's remand instructions. The Court gave the Oregon Supreme Court clear directions when it remanded this case: "[W]e believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth." 127 S. Ct. at 1065. This Court plainly contemplated that on remand the Oregon Supreme Court would provide an appropriate remedy for the violation of Philip Morris's constitutional right to be protected against the risk of punishment for harms to non-parties. That is why the Court stated in the very next sentence that the proceedings on remand might lead either to a "new trial, or a change in the level of the punitive damages award." *Ibid.*

Plaintiff's principal argument against the current grant of certiorari was that the Oregon Supreme Court did in fact "faithfully appl[y]" this Court's constitutional standard on remand. Cert. Opp. 13-15.

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[4] Accord, *Ford* v. *Georgia*, 498 U.S. 411, 417-18 (1991) (reversing state court decision that raised a new procedural bar to petitioner's federal claim *sua sponte* for the first time on remand from this Court); *Utah Pub. Serv. Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 471-72 (1969) (reversing after district court, on remand, had ordered a partial divestiture of a corporate acquisition that this Court had found to violate Clayton Act, an order that "[did] not comply with our mandate. * * * Only a cash sale will satisfy the rudiments of complete divestiture.").

That standard, plaintiff contended, entitles a defendant to protection against punishment for harm to non-parties only "upon request." According to plaintiff, the Oregon Supreme Court did what it was told to do when it found that there had not been a proper "request" at trial.

That contention flies in the face of the text of the Oregon court's opinion, which stated that there was a "preliminary, independent *state law standard* that we must consider, *before we address the constitutional standard* that the United States Supreme Court has articulated." Pet. App. 13a (emphasis added). The Oregon court then asserted that it had the power to reaffirm its judgment on the basis of an adequate state ground "*without reaching* the federal question." *Ibid.* (emphasis added).

This Court's instruction was to "apply" the substantive "constitutional standard" that the Court had announced. The Oregon court failed, however, to "address the constitutional standard" at all, Pet. App. 13a, much less to do so "faithfully." Opp. 13. Instead, the Oregon court found that because Requested Instruction 34 was "erroneous in a number of ways that are *unrelated to the issues addressed by the United States Supreme Court*," Pet. App. 15a (emphasis added), the submission of that instruction failed to preserve Philip Morris's constitutional claim *as a matter of state law*. *Ibid.* The Oregon Supreme Court simply sidestepped the substantive constitutional standard it was directed to "apply." Reversal is warranted, both to implement this Court's judgment in *Williams II* and to vindicate the Court's authority.

B. A State Court Is Not Free To Re-Examine, On Remand, The Premise Of This Court's Decision On The Merits.

Beyond its failure to follow this Court's instructions on remand, the Oregon Supreme Court improperly re-examined and rejected a major premise on which the Court's decision rested. When this Court implicitly or necessarily resolves an issue in rendering its decision in a particular case, that resolution becomes law of the case and is binding on the lower courts. In *Williams II*, plaintiff argued broadly under Oregon's "correct in all respects" rule that Philip Morris had forfeited its claim for a protective instruction. Philip Morris responded with a showing that it had preserved its claim by making it clearly and on a timely basis in the trial court and on appeal. This Court agreed with Philip Morris when it reached the merits of the due process claim and remanded for application of the proper constitutional standard. The Oregon Supreme Court should not have second-guessed the fundamental premise of *Williams II*.

In its petition for certiorari and its opening brief in *Williams II*, Philip Morris set forth the text of its proposed instruction on harms to non-parties and summarized the oral argument that it had presented at the trial court's charge conference. Petitioner's Brief, No. 05-1256, at 4; Petition, at 14-15. Philip Morris argued that it had a due process right to the instruction, that the instruction was accurate as proposed, and that the trial court's failure to give the instruction was highly prejudicial. Br. 23-25; Reply Br.

5-6.[5] Invoking Oregon's "correct in all respects" rule, plaintiff asserted in broad terms both in opposition to certiorari and in her merits brief that the proposed instruction on harms to non-parties was properly denied because it failed "to meet minimum requirements for accuracy and clarity," was "erroneous and self-contradicting," was not "altogether free from error," and was unduly "lengthy" and "confusing." Respondent's Brief, No. 05-1256, at 46-49; Brief in Opposition at 22-24.

Three of the dissenting Justices found merit in plaintiff's waiver argument:

> The Court's order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendant's requested charge number 34. * * *
>
> Under [the proposed] charge, just what use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

127 S. Ct. at 1068-69 (Ginsburg, J., dissenting).

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[5] The joint appendix contained the transcript of Philip Morris's argument at the charge conference in support of the requested instruction (Joint Appendix, No. 05-1256, at 190a-196a) and the full text of Requested Instruction 34. *Id.* at 279a-281a.

But the majority implicitly rejected that forfeiture argument. This Court recognized that Philip Morris "asked" for the instruction and "argued" in its favor in the trial court. 127 S. Ct. at 1064. And the Court found that the proposed instruction accurately stated due process requirements by "distinguish[ing] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Ibid.*

The ruling of this Court requiring the Oregon court to "apply" the *Williams II* due process standard on remand rested on the premise that Philip Morris had preserved its constitutional claim. And that is now law of the case, binding on the Oregon courts. See *United States* v. *Williams*, 504 U.S. 36, 40 (1992) (when the Court reaches the merits of a federal claim, in the face of the plaintiff's assertions that the claim was not properly presented, this Court "necessarily considered and rejected" those assertions); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 232 (1969) (reversing state court that adhered on remand to its earlier ruling that federal claim was barred by state procedural default: "When the case was first here respondents opposed the petition, claiming [the state rule] was not complied with. Petitioners filed a reply brief addressing themselves to that question. Thus the point now tendered was fully exposed when the case was here before, though we ruled on it *sub silentio*."). When, on remand, the Oregon Supreme Court renewed the issue of preservation and found waiver under state law (on a more attenuated theory than that invoked by the dissenting Justices in *Williams II*, see *infra* pp. 27-35), it effectively re-examined the underpinnings of this Court's decision—and exceeded its authority.

In *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam), this Court rejected a state court's similar attempt to manufacture a new state-law ground for affirmance on remand. This Court had held unconstitutional a judgment of civil contempt against the NAACP for failing to disclose the names and addresses of its members. The Court "remanded the case to the Supreme Court of Alabama 'for proceedings not inconsistent with' our opinion." *Id.* at 241. On remand, the Alabama Supreme Court refused to vacate the contempt judgment, finding for the first time that the NAACP had failed to comply with other aspects of the State's order. *Id.* at 242.

This Court reversed, holding that the lower court had erred by finding a new rationale for upholding the judgment on remand despite the federal constitutional defect previously identified by this Court. When the case had been before this Court,

> [t]he State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance. * * * That was also the basis on which the issue was briefed and argued before us by both sides after certiorari had been granted. * * * And that was the premise on which the Court disposed of the case. * * * In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition.

Patterson, 360 U.S. at 243-44.

Likewise, in *Yates*, where the Court's "mandate contemplated that the state court would consider" whether its judgment "could stand" in light of new

constitutional law announced by the Court (484 U.S. at 215), this Court warned the South Carolina Supreme Court against adopting a state-law procedural rule in order to defeat the federal right:

> Respondents also argue that South Carolina has the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding. We reject this argument * * *. [W]e do not read the South Carolina Supreme Court's opinion as having placed any limit on the issues that it will entertain in collateral proceedings. *Since it has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires.*

484 U.S. at 217-18 (emphasis added). Had the South Carolina Supreme Court held on remand that the petitioner waived his due process claim, it plainly would have contravened this Court's directive and overstepped its authority—as the Oregon Supreme Court did in this case.

Patterson and *Yates* compel reversal here. As in those cases, the state court lacked the power to reexamine the premise of this Court's decision and thereby render this Court's ruling on the merits a meaningless exercise. Because the Oregon Supreme Court considered previously the merits of the federal claim, it now "has a duty to grant the relief that federal law requires." A state court on remand may not belatedly raise a state-law ground in order to avoid execution of this Court's directions. See *Smith*, 127 S. Ct. at 1698-99 (because the state court was obliged to "defer to our finding" of a federal constitutional violation, it was not free to raise "a new state proce-

dural bar" as a means to avoid the directions of the mandate); *Sibbald*, 37 U.S. at 488 (lower court on remand may not "intermeddle with [the case] further than to settle so much as has been remanded"). Indeed, this Court had the option, each of the last two times it considered this case, to apply the proper constitutional standard directly and order its own remedy, rather than remanding to allow the Oregon courts to do so. 28 U.S.C. § 2106. It cannot be the case that, as a result of the remand, Philip Morris lost its remedy for violation of its constitutional rights.[6]

When this Court grants certiorari in a state case because the lower court has apparently misperceived federal constitutional law, it proceeds to resolve the constitutional issues in a manner that conserves the Court's own limited resources. As it explained in *Michigan* v. *Long*, 463 U.S. 1032 (1983):

> [W]hen * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from

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[6] In some cases a state court's ruling on points of state law following remand may be consistent with the Court's opinion and mandate, and on occasion this Court invites resolution of such issues. See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268 (1979). This is not such a case. Moreover, on remand from this Court, state courts remain free to recognize and apply state-law principles that offer broader protection of rights than federal law provides. See, *e.g.*, *Cooper* v. *California*, 386 U.S. 58, 62 (1967); cf. *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1038-42 (2008). The decision of the Oregon Supreme Court, by contrast, would defeat a federal right recognized by this Court and deviate from clear instructions given to it.

> the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. The Court rejected the alternative approach of remanding an ambiguous case back to state court for clarification of the grounds upon which it rested, in part "because of [concerns about] the delay and decrease in efficiency of judicial administration." 463 U.S. at 1039-40. Indeed, the Court observed in *Long* that it "disfavor[s]" such requests, and "require[s] a clear and express statement that a decision rests on adequate and independent state grounds." *Id.* at 1042 n.7.

The course of proceedings followed by the Oregon Supreme Court here is contrary to the goal of sound judicial administration set forth in *Long*. In their consideration of this case over a period of nine years, the Oregon courts never even suggested that Philip Morris had failed to preserve its constitutional claim; they rejected that claim on the merits.[7] Even apart from considerations of judicial economy, moreover, invocation of a state default rule after both the state court and this Court have decided a federal question on the merits raises the specter of procedural manipulation aimed at avoiding the faithful application of this Court's constitutional rulings.

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[7] The Oregon courts were well aware of plaintiff's argument that Philip Morris's federal claim was procedurally barred by errors of state law in the proposed instruction; plaintiff briefed that contention several times. See, *e.g.*, App. Br. to Or. Ct. App. (Jan. 2004), at 18-19; App. Resp. to Br. on the Merits, Or. Sup. Ct. (March 2005), at 33-34.

II. THE STATE-LAW GROUND INVOKED BELOW WAS NOT ADEQUATE TO DEFEAT PHILIP MORRIS'S DUE PROCESS RIGHTS.

This Court should reverse for a second, independent reason: the procedural bar invoked by the Oregon Supreme Court is not an adequate state ground for the judgment. The adequacy of a state-law bar to a due process challenge is "itself a federal question." *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). The Oregon Supreme Court's assertion on remand that its newfound waiver theory was "an independent and adequate state ground for affirming the trial court's ruling," Pet. App. 13a, is entirely irrelevant: the sufficiency of a state-law procedural rule to bar a federal constitutional claim turns not on the state court's characterization of that rule but rather on whether the rule meets the established *federal* standards for adequacy. *Douglas*, 380 U.S. at 422. As Justice Holmes explained for the Court, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923).

The procedural bar asserted by the Oregon Supreme Court fails to meet this Court's standards. As applied in this case, the correct-in-all-respects rule serves no legitimate state purpose. And it is neither firmly established nor regularly followed in the manner at issue here. Philip Morris did not have adequate contemporaneous notice of the required procedure.

A. As Applied In This Case, The Procedural Rule Invoked By The Oregon Supreme Court Serves No Legitimate State Interest.

Philip Morris proposed a jury instruction that correctly stated the constitutional principle, and defense counsel presented oral argument on the point. That was sufficient to preserve Philip Morris's federal claim. See *Osborne* v. *Ohio*, 495 U.S. 103, 125 (1990) ("an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests"). The Oregon Supreme Court's application of a stricter rule serves no legitimate state interest and is therefore inadequate as a matter of federal law.

1. *Philip Morris Presented Its Federal Claim To The Trial Court, Which Fully Understood The Claim And Rejected It On The Merits.*

Philip Morris adequately preserved its federal claim. As this Court explained, "Philip Morris asked the trial court to tell the jury that 'you may consider the extent of harm suffered by others in determining what the reasonable relationship is' between any punitive award and 'the harm caused to Jesse Williams' by Philip Morris's misconduct, 'but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims.'" 127 S. Ct. at 1061 (ellipses and brackets omitted) (quoting from joint appendix). Philip Morris made that request in a separately numbered paragraph of its Requested Instruction 34—a paragraph that was, under this Court's holding in *Wil-*

liams II, correct in all respects. As the Oregon Supreme Court acknowledged (Pet. App. 6a), the trial court conducted a "line-by-line" analysis of Philip Morris's proposed charge and considered and ruled upon the harms-to-non-parties instruction as a distinct issue, rejecting it on the merits. *Id.* at 6a, 16a, 156a.

On remand from this Court, the Oregon Supreme Court refused to remedy this constitutional error because it identified two supposed errors of *state law* in a different paragraph of Requested Instruction 34. This separate paragraph, designated as paragraph 2, would have told the jury that it "may," rather than "shall," take into account various statutory factors in awarding punitive damages. And it would have asked the jury to consider the extent to which Philip Morris was motivated by "illicit" profits, as opposed to having the jury consider all profits Philip Morris may have received from the sale of cigarettes in Oregon, lawful as well as tortious. *Id.* at 18a-22a.

These purported errors in paragraph 2 had no effect at all on the court's consideration of the correct instruction on harms to non-parties that was designated as paragraph 1. The Oregon Supreme Court nevertheless faulted Philip Morris for including paragraph 1 and paragraph 2, along with other legal principles pertaining to punitive damages, within Requested Instruction 34. The court observed that it is dangerous for counsel to place "all the party's eggs in one instructional basket." Pet App. 15a. Under the Oregon Supreme Court's approach, had Philip Morris submitted the harms to non-parties instruction on a separate sheet of paper, the federal claim would have been preserved.

But the format of Philip Morris's requested instruction—a single "punitive damages" instruction containing multiple paragraphs covering distinct points of law—tracks the structure of the state's pattern jury instructions on punitive damages, U.C.J.I. § 75.01-06.[8] Indeed, plaintiff too submitted a single, global punitive damages instruction for the court's consideration. During the charge conference, the trial judge was working from a copy of *plaintiff's* Requested Instruction 34. The structure of that version paralleled both Philip Morris's and the state's pattern instruction; it too grouped a number of separate legal rules, in separate paragraphs, under a single heading, borrowed from the model charge: "PUNITIVE DAMAGES—PRODUCTS LIABILITY." J.A. 35a-36a. Everyone in the courtroom understood that each party was asking the judge to depart from the pattern instruction in several distinct respects, captured in separate paragraphs in the parties' respective instructions.

The trial court considered and rejected Philip Morris's proposed harm to non-parties instruction as a freestanding matter. Philip Morris argued that the Constitution prohibits punishment for harms to non-parties. J.A. 18a-19a. The trial court asked defense counsel to identify cases holding "that this element * * * has to be there for the jury." *Id.* at 20a. Counsel acknowledged that there was no case

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[8] U.C.J.I. § 75.06 is one of several model jury instructions for punitive damages, and its structure is typical of the group: under one heading, the instruction contains separate paragraphs explaining the standard for punitive liability; the burden of proof (clear and convincing evidence); the jury's discretion; and the multiple factors relevant to setting the amount of punitive damages.

squarely on point but argued that harm to non-parties was a "consideration[] that the [Supreme] Court looked at in the *BMW* case and a number of others." Because no case directly held that such an instruction was necessary, the court refused to give one. *Ibid.* Thus, the trial court refused to charge the jury on harms to non-parties not because it believed that *other paragraphs* of the instruction misstated *state* law, but because the court disagreed with Philip Morris's position that the instruction on harms to non-parties was required by *federal* law. The fact that this instruction happened to appear along with other paragraphs of Philip Morris's proposed charge under a single heading, rather than under its own separate heading, had no effect on the trial court's ruling at the charge conference.

2. The Waiver Rule Adopted Below Serves No Legitimate State Interest.

The Oregon Supreme Court's "correct in all respects" requirement serves no legitimate purpose as applied in this case. For nearly a century, the Oregon courts have been clear about the purpose of the "correct in all respects" rule: it exists to ensure that trial judges are fairly apprised of a party's request, and to avoid placing on the trial judge the burden of editing an incorrect requested instruction on a particular legal point to bring it into line with the law. See, *e.g.*, *Sorenson* v. *Kribs*, 161 P. 405, 410 (Or. 1916) ("[i]f a contrary rule obtained, it would not be necessary for counsel carefully to prepare requested instructions"); *Brigham* v. *Southern Pac. Co.*, 390 P.2d 669, 671 (Or. 1964) ("The court was not required to edit the instructions given [by the parties] and eliminate that part which may have been objectionable."); *Hooning* v. *Henry*, 213 P. 139, 141 (Or. 1923)

("it is not the duty of the court to patch up a request to make it conform to the law of the case").

When a party proposes an instruction on a particular point of law that is partially correct but partially incorrect, it should not be the court's job to sort the wheat from the chaff. But a "correct in all respects" rule makes no sense and serves no purpose when applied to a series of requested instructions on *different* points of law, each argued separately by counsel and considered separately by the court. A rule like the one applied at the eleventh hour of this case would not free courts from editing responsibilities. Its only effect would be to force counsel to submit individual requests on separate pieces of paper. The substance of the requests, and the judge's consideration of them, would be exactly the same. Thus, even assuming that the Oregon court did identify real "errors" in other paragraphs of the proposed charge, the court's reliance on them to foreclose Philip Morris's due process claim is indefensible.

Where—as here—a party asserts a federal right clearly and gives the trial court an adequate opportunity to consider its argument on the merits, the claim is preserved as a matter of law. See *Douglas*, 380 U.S. at 422 ("[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."). The Oregon Supreme Court's rigid reliance upon a requirement that a proposed "instruction" be "correct in all respects," even in respects that have nothing to do with the federal issue and even when the trial court decided that federal issue independently and on the merits, is a clas-

sic example of the "pointless severity" that this Court has repeatedly held inadequate to bar federal rights. See, *e.g.*, *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964).

For example, in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the Court ruled that a party has no duty to ask for a jury instruction on a point of law that the trial court has already rejected. Osborne was convicted under an Ohio child-pornography statute. In rejecting his overbreadth challenge, the Ohio Supreme Court held that the statute required, *inter alia*, a finding of lewdness. Osborne pointed out that the jury had not been asked to make such a finding, rendering his conviction unconstitutional. But the Ohio Supreme Court held that Osborne had waived that argument when he failed to ask for an instruction on the subject.

This Court reversed and remanded for a new trial before a properly instructed jury, finding that the Ohio court's waiver theory did not result in forfeiture. Osborne had argued earlier in the case that the court should require the prosecution to prove lewdness, and the court had rejected that argument.

> [W]e believe that we may reach Osborne's due process claim * * *. The trial judge, in no uncertain terms, rejected counsel's argument that the statute was overbroad. The State contends that counsel should then have insisted that the court instruct the jury on lewdness because, absent a finding that this element existed, a conviction would be unconstitutional. Were we to accept this position, we would force resort to an arid ritual of meaningless form, and would further no perceivable state interest.

495 U.S. at 124 (citations, ellipses, and quotation marks omitted). If the State's asserted ground was inadequate in *Osborne*, the ground invoked here is certainly inadequate. Unlike Osborne, Philip Morris *did* ask for a jury instruction that correctly stated federal law—an instruction that the trial court rejected on the merits.

The rule announced below also bears a striking resemblance to the forfeiture doctrine applied by the Alabama Supreme Court in *Flowers*. There, the state court refused to reach the merits of the plaintiff's constitutional claim because it found errors in other portions of the plaintiff's brief: "[W]here unrelated assignments of error are argued together and one is without merit, the others will not be considered." 377 U.S. at 295 (internal quotation marks omitted). This Court rejected the "pointless severity" with which the Alabama Supreme Court applied this rule, noting that the NAACP's brief had simply grouped its assignments of errors together under the same numerical heading for stylistic purposes. *Id.* at 297. Similarly, Philip Morris grouped separate parts of the jury instructions addressing punitive damages under a single, general heading ("PUNITIVE DAMAGES—PRODUCTS LIABILITY") for the convenience of the court and in conformity with the format of Oregon's model jury instructions. J.A. 31a-34a. The supposed errors in other paragraphs had no effect on the court's consideration of the relevant instruction.

Lee v. *Kemna*, 534 U.S. 362 (2002), likewise compels reversal here. In that case, a criminal defendant made an oral request for a continuance after several defense witnesses inexplicably disappeared from the courtroom. The judge denied the motion

from the bench, explaining that he would be unavailable the following day because of a personal obligation. Following conviction, the defendant appealed, arguing that the failure to grant a continuance had violated his due process rights. The Missouri Court of Appeals held that the federal claim was not properly preserved because the request for a continuance had not been in writing or accompanied by an affidavit.

On habeas review, this Court accepted the state court's contention that Missouri law required continuance motions to be in writing and accompanied by affidavits. Nevertheless, the Court explained, there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." 534 U.S. at 376. The Court identified three considerations that led it to conclude that the case before it fit that mold. Each of those three factors applies with at least equal force here.

First, "when the trial judge denied Lee's motion, he stated a reason that could not have been countered by a perfect motion." *Id.* at 381. In other words, the trial judge did not deny the motion because it was made orally; he denied it because of a personal scheduling conflict the following day. Even if the continuance motion had complied with the state's procedures, it still would have been denied. The same is true here.

Second, the Court noted in *Lee* that "no published Missouri decision directs flawless compliance" with the state rules cited by the Missouri court. *Id.* at 382. Again, the same is true here. The "correct in all respects" rule had never before been applied by the Oregon courts to effect a waiver of a party's right

to a jury instruction that correctly stated the law and that was considered independently by the parties and the court, simply because of a supposed error in a separately numbered paragraph of the instruction on a separate topic. See pp. 39-40 *infra*.

Third, the Court explained in *Lee* that in any case, the defendant "substantially complied" with the state rule by asking for a continuance in clear terms. Even a rule of "undoubted legitimacy" ceases to be a bar where it is "substantially met" by the defendant's invocation of a federal right. *Id.* at 385. Here, the Oregon rule was "substantially met" by Philip Morris's proffer of a separate paragraph correctly stating the governing legal standard. As a matter of federal law, then, Philip Morris properly preserved its constitutional claim.

B. The Rule Announced By The Oregon Supreme Court Was Neither "Firmly Established" Nor "Regularly Followed."

The Oregon Supreme Court's holding that Philip Morris forfeited its due process rights fails for a second reason. A state procedural default rule is not adequate to bar a federal claim unless the rule is a "firmly established and regularly followed state practice." *James* v. *Kentucky*, 466 U.S. 341, 348-49 (1984). A state rule that is novel or applied inconsistently is inadequate to preclude consideration of a federal claim. See, *e.g.*, *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958). "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Ford* v. *Georgia*, 498 U.S. 411, 423 (1991)

(quoting *Patterson*, 357 U.S. at 457-58). Indeed, even where a state procedural rule is "sensible" in the abstract, *Ford*, 498 U.S. at 422, it cannot bar consideration of a federal claim if it is not applied "evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982).

The hyper-technical application of the "correct in all respects" rule at issue here, which represents a marked departure from the way in which the rule has consistently been applied in past cases, is precisely the type of novel, ambushing bar that cannot foreclose a federal claim.

1. The Decision Below Cannot Be Reconciled With Preexisting Oregon Precedent.

In *State* v. *George*, 97 P.3d 656 (Or. 2004) (en banc), the Oregon Supreme Court reaffirmed the rule that where the trial court rejects a proposed instruction as a matter of substantive law—and not because it finds fault with the wording of the proposed instruction—there is no need to submit a revised instruction, because doing so would be "an exercise in futility." *Id.* at 339. The decision below is squarely at odds with *George* and similar Oregon cases.

The defendant in *George* was charged with murder and presented an insanity defense. An Oregon statute then in effect required that juries in insanity cases be told what would happen to the defendant if his defense was accepted—that is, that he would be confined to a mental institution and released under certain circumstances. The State had a detailed pattern jury instruction for these purposes; defense counsel objected to its use and proposed an alternative instruction he argued was more "jury friendly."

The trial judge, however, refused to give *any* instruction on the consequences of an insanity verdict.

On appeal, the defendant challenged the failure to give his requested instruction. The Oregon Court of Appeals rejected the argument, citing the "correct in all respects" rule, because, in the estimation of the court, the defendant's proposed instruction was inaccurate in several respects. The Oregon Supreme Court reversed. Because the trial judge had ruled that he was not required to give *any* instruction on the consequences of an insanity verdict, it was immaterial that the defendant's proposed instruction might have contained its own inaccuracies. Even if the defendant had submitted a perfect instruction, his request still would have been denied. "Our requirements respecting preservation," the Oregon Supreme Court wrote, "do not demand that parties make what the record demonstrates would be futile gestures." *Ibid.*[9]

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[9] *George* did not break new ground; the decision was based on a long line of Oregon cases (dating back to *Sorenson* in 1916) holding that the purposes of appellate preservation rules "are to allow the adversary to present its position and to permit the court to understand and correct any error." *State* v. *Brown*, 800 P.2d 259, 266 (Or. 1990). See also *State* v. *Hitz*, 766 P.2d 373, 376 (Or. 1988) ("Efficient procedures are instruments for, not obstacles to, deciding the merits."). "[W]here the broad legal issue has been adequately identified to the trial court, the issue will be deemed preserved for purposes of appeal." *State* v. *Mack*, 183 P.3d 191, 194 (Or. Ct. App. 2008). This is true even if counsel has not identified "the source for his position," *State* v. *Doern*, 967 P.2d 1230, 1233 (Or. Ct. App. 1998), or "ma[de] an argument in support of [it]." *State* v. *Martin*, 897 P.2d 1187, 1189 (Or. Ct. App. 1995). Discussion between the court and counsel is deemed sufficient to "find that the issue was brought

The decision below cannot be reconciled with *George*. Just as in *George*, the trial court here rejected Philip Morris's proposed instruction because it believed—incorrectly—that such an instruction was not legally required. And just like in *George*, a submission from trial counsel that complied with the "correct in all respects" rule—in this case, a reprint of the harms-to-non-parties instruction on a separate page—would have been an utterly empty gesture.

Indeed, the argument for waiver is much weaker here than in *George*. The defendant in *George* proffered an instruction that the Oregon Supreme Court held was an incorrect statement of the law *on the particular point under consideration*. Philip Morris's instruction on harms to non-parties, by contrast, was assumed by the Oregon Supreme Court to be correct. The errors identified by the Oregon Supreme Court on remand concerned other subjects entirely.

Rather than try to distinguish *George* and its predecessors, the decision here under review simply ignored those precedents. At oral argument following remand from this Court, the member of the Oregon Supreme Court who authored both of its opinions in this case remarked that the court did not need to be concerned about the consistency of its ruling with prior opinions such as *George*, because "the United States Supreme Court wouldn't care for one second" about "[o]ur interpretation as to whether *George* is binding, useful, or irrelevant," and because this Court "assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on *George*, for the Court to assume anything

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to the trial court's attention." *State* v. *Harris*, 599 P.2d 456, 458 (Or. 1979).

different nor for you to claim anything different." J.A. 93a.

That is not a correct statement of the law. Although this Court does presume that state courts act in good faith, it is certainly empowered to examine closely the basis for a court's denial of a party's constitutional rights. See, *e.g.*, *Patterson*, 357 U.S. at 457-58 (holding that a purported state rule requiring appellants to file a writ of mandamus in order to preserve certain claims was inadequate to bar review because the rule was inconsistent with "prior state cases" on the subject); *Barr*, 378 U.S. at 149 (rejecting proffered state-law ground because it conflicted with four other state decisions). If a state procedural rule that is neither "firmly established" nor "regularly followed" cannot "prevent implementation of federal constitutional rights," *James*, 466 U.S. at 348-49, it follows *a fortiori* that a purported state practice that is starkly *inconsistent* with established state law is no bar at all. Any other result would permit a party trying to preserve its federal claim to be ambushed by unprecedented and unforeseeable applications of state procedural requirements.

2. The Decision Below Dramatically Expands The Scope Of The "Correct In All Respects" Rule.

In her brief opposing review, plaintiff argued that the "correct in all respects" rubric has been part of Oregon practice for many years. That is plainly true but likewise irrelevant: the decisive question is not whether such a rule exists in Oregon, but whether the rule's extraordinary *application* here was established and foreseeable at the time the instruction was proposed.

It was not. This case marks the first time in any reported Oregon decision that an appellate court has rejected an instruction on one point of law, after the trial judge considered that instruction separately at the charge conference, merely because it appeared under the same heading as a defective instruction on a different point of law. Indeed, in every decision applying the "correct in all respects" rule dating back at least to the 1916 *Sorenson* case, the issue was whether the proposed instruction's treatment of a particular subject was a correct statement of the specific legal proposition the litigant was raising on appeal.[10] Plaintiff has never cited any case in which an Oregon court has applied the "correct in all respects" requirement the way it was applied here. The decision below, far from applying a firmly established rule of state procedure, deviated dramatically from the way instructional requests have been treated by the Oregon courts in the past.

3. Settled Oregon Law Required The Oregon Courts To Consider Any State Procedural Bar Before *Addressing The Federal Constitutional Issue.*

Although the Oregon appellate courts had three prior opportunities to identify a state-law bar to Philip Morris's federal claim, they never did so. Rather, all three prior decisions reached the merits of Philip Morris's constitutional claim. See Pet. App. 47a, 104a-105a, 140a. That is significant: it is es-

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[10] See, *e.g.*, *Bennett* v. *Farmers Ins. Co.*, 26 P.3d 785 (Or. 2001); *State* v. *Reyes-Camarena*, 7 P.3d 522 (Or. 2000); *Beglau* v. *Albertus*, 536 P.2d 1251 (Or. 1975) (en banc); *Owings* v. *Rose*, 497 P.2d 1183 (Or. 1972); *Brooks* v. *Bergholm*, 470 P.2d 154 (Or. 1970).

tablished procedure in Oregon to decide all questions of state law first, in order to avoid unnecessarily reaching federal constitutional issues.

The Oregon Supreme Court has referred to this decisional hierarchy as "axiomatic." *State* v. *Moylett*, 836 P.2d 1329, 1332 (Or. 1992) ("By now, the appropriate method of resolving properly raised issues of criminal procedure in Oregon should be axiomatic. All issues should first be addressed on a subconstitutional level."); see also, *e.g.*, *State* v. *Kennedy*, 666 P.2d 1316, 1318 (1983) ("The history of this case demonstrates the practical importance of the rule, *often repeated* in recent decisions, that all questions of state law be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states.") (emphasis added).

Given this firmly established hierarchy of decisional grounds, the fact that the Oregon Supreme Court applied the supposed bar only *after* this Court reversed it on the merits precludes a finding of adequacy. In *Lee*, this Court rejected the adequacy of the state procedural rule in part because the "asserted procedural oversights * * * were first raised more than two and a half years after [his] trial." 534 U.S. at 380. Indeed, neither the trial court nor the prosecutors in *Lee* made any contemporaneous reference to the supposed defects in the defendant's request. Those circumstances contributed to the Court's conclusion, discussed above (at p. 34), that the purported state bar to consideration of the defendant's due process claim was an unjustifiable application of a "generally sound" rule.

Here, of course, the procedural history is even more stark than it was in *Lee*. At least in *Lee*, the

asserted state bar was recognized by the appellate court at the first opportunity. In this case, by contrast, the Oregon courts rebuffed plaintiff's multiple invitations to find a state-law waiver of the federal issue—until *after* this Court remanded the case with instructions to apply the proper constitutional standard to Philip Morris's federal claim.

III. THIS COURT SHOULD DIRECT THE OREGON SUPREME COURT TO GRANT A NEW TRIAL.

This Court held in *Williams II* that it is "important that States avoid procedure that unnecessarily deprives juries of proper legal guidance." 127 S. Ct. at 1064. Where the risk of punishment for harms to non-parties "is a significant one—because, for example, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk." *Id.* at 1065. Thus, the federal right at issue here is the right to have the trial court, "upon request," provide "*some* form of protection" against the risk of jury confusion and the possibility of unconstitutional punishment. *Williams II*, 127 S. Ct. at 1065.

In this case, the "evidence that was introduced at trial" and the "kinds of argument the plaintiff made to the jury" clearly gave rise to a significant risk of unconstitutional punishment. Plaintiff's counsel presented evidence of allegedly false public statements made by Philip Morris over a 46-year period. As the Court observed, plaintiff's counsel then

> told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. * * * In

> Oregon, how many people do we see outside, driving home * * * smoking cigarettes? * * * Cigarettes * * * are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed].

127 S. Ct. at 1061 (ellipses and brackets in original).[11]

Such argument, coupled with the type of evidence introduced at trial,[12] created a significant "risk" that the jury was "confus[ed]" and that it punished Philip Morris for harms to non-parties. After all, the Oregon appellate courts upheld the $79.5 million punitive award precisely because they concluded, based on the trial record, that the alleged fraud caused harm to many persons other than Jesse Williams. The Oregon Court of Appeals, for example, wrote that "the jury could find on this record" that Philip Morris's actions "affected large numbers of tobacco consumers in Oregon other than Williams." Pet. App. 144a. It noted in a later opinion that "it would have been reasonable for the jury to infer that at least 100 members of the Oregon public" had been

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[11] Plaintiff's counsel made the same argument in his opening statement. See J.A. 9a ("To this day, they choose to deny any and all responsibility for the *massive harm caused to millions of people* by their product, including Jesse Williams and his family.") (emphasis added); *Id.* at 10a ("[T]he basis of the claim [is] [w]hat they told the American public, what they did to the American public, Jesse Williams being a part of it.").

[12] Plaintiff summarized this evidence in her merits brief in *Williams II*. Brief for Respondent, No. 05-1256, at 1, 7-15 (discussing, *e.g.*, conduct that affected "millions of American smokers" (*id.* at 1), and caused a "staggering number of deaths per year" (*id.* at 14)).

harmed by Philip Morris's actions. *Id.* at 112a. The Oregon Supreme Court likewise concluded, based on an "assessment of human nature" that it "attributed" to the jurors, that widespread injuries resulted from the alleged fraud. *Id.* at 36a n.1. Given that the reviewing courts explicitly relied on non-party evidence in exactly the manner forbidden by this Court's decision in *Williams II*, there can be no doubt that there was a "significant" risk that the jury did so as well. Yet no protection of any kind was afforded against this risk.

As this Court recognized, Philip Morris responded to this evidence and argument by requesting protection of its constitutional rights, both in the form of a jury instruction that correctly stated federal law and by "argu[ing] that the Constitution 'prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harms to nonparties.'" 127 S. Ct. at 1064 (quoting the Oregon Supreme Court at Pet. App. 48a-49a). No such protection was provided. 127 S. Ct. at 1061-62.

The trial court's constitutional error plainly was not harmless: the jury responded to plaintiff's improper evidence and argument with a penalty that was nearly 100 times greater than plaintiff's compensatory damages. "[A] federal constitutional error can[not] be held harmless [unless] the court [is] able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).[13] It is well established that "[w]hen dam-

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[13] The *Chapman* standard is normally applied in criminal cases, but as this Court has noted, "civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *O'Neal* v. *McAninch*, 513 U.S. 432, 441 (1995). See also 11

ages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, 'the error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict,'" because the "effect of the erroneous instruction is * * * unknowable." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 312 (1986) (quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 n.12 (1981)).

This Court has already twice remanded this case to the Oregon courts, only to have the vacated judgment erroneously reinstated. In these circumstances, rather than remand for a third time without specific guidance, this Court should exercise its power to direct the grant of a new trial. See 28 U.S.C. § 2106 ("The Supreme Court * * * may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

The Court has exercised that power in other instances where a lower court has repeatedly failed to execute this Court's mandate. See, *e.g.*, *Remmer* v. *United States*, 350 U.S. 377, 383 (1956) (where district court failed to comply with mandate, this Court again granted review, vacated the decision below, and remanded again with instructions to grant a new trial). Accord, *Yates*, 484 U.S. at 215; *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 621 (1966)

Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure § 2881 (2d ed. 1995) (in applying harmless error standards, "the courts have drawn no distinction between civil and criminal cases * * *").

("[I]n view of the fact that this controversy already dates back more than eight years, that it has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now."); *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Tyler* v. *Magwire*, 84 U.S. 253, 290 (1872).

Although the Court broached the possibility that a remittitur or reduction of the punitive award might serve as remedy (see 127 S. Ct. at 1065), we respectfully submit that in these circumstances that remedy is not adequate. While a remittitur to the maximum amount the constitution would allow may be an appropriate and adequate remedy for an award whose only defect is excessiveness,[14] it does not suffice to remedy prejudicial *instructional* error. That is because there is no way to know what amount of punishment a properly instructed jury would have imposed. In this case, had the jury understood that it could punish Philip Morris only for the impact of its conduct on Jesse Williams, it might well have selected an award far below the constitutional ceiling.

This Court has recognized the need for a new trial to remedy instructional error that bears on the magnitude of a penalty. In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), the jury was instructed that, if it found the defendant guilty, it was required to sentence him to 40 years imprisonment in accordance with the State's habitual offender statute. Because

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[14] Remittitur in Oregon is only to the largest constitutionally allowable amount. See, *e.g.*, *Goddard* v. *Farmers Ins. Co. of Oregon*, 179 P.3d 645, 670-71 (Or. 2008); *Waddill* v. *Anchor Hocking, Inc.*, 78 P.3d 570, 572 (Or. App. 2003).

that statute was subsequently invalidated, the defendant sought a new sentencing trial. The state appellate court rejected his claim on the ground that the sentence imposed on him remained within the range (ten years to life) from which a properly instructed jury could have selected its penalty. This Court vacated and remanded, explaining that "Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh" as the one it imposed under the invalid statute. *Id.* at 346 (emphasis in original). Because there was a "substantial" possibility that the jury might have imposed a less severe penalty had it not been instructed about the invalid statute, due process required that the defendant be afforded a new trial on the appropriate sentence. *Id.*

The Ninth Circuit has twice considered this remedial issue in civil cases in the wake of *Williams II*. See *Merrick* v. *Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007); *White* v. *Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2007). In both cases, it concluded that the district court had committed prejudicial error by refusing to instruct the jury regarding punishment for non-party harms, and in both cases the Ninth Circuit held that the defendant was entitled to a new trial on punitive damages. As that court explained, a traditional remittitur is "less appropriate [than a new trial] where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount." *Merrick*, 500 F.3d at 1018; see also *White*, 500 F.3d at 973 ("remittitur is not designed to compensate for excessive verdicts in cases where [a] jury is improperly instructed") (citing *Werbungs Und Commerz Union*

Anstalt v. *Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991)).

For these reasons, the only adequate remedy for the violation of Philip Morris's constitutional rights is a new trial. We submit that the proper scope of that trial is a full re-examination of the entire case. See *Maxwell* v. *Portland Terminal R.R. Co.*, 456 P.2d 484, 486 (1969); *Gasoline Prods. Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931). But that is a question that should be decided in the first instance by the Oregon trial court, as it encompasses issues of both state law and federal due process.[15]

CONCLUSION

The judgment below should be vacated and the case remanded with instructions to grant a new trial.

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[15] The Oregon courts have long recognized a general rule in favor of complete retrial where a trial error taints a part of the jury's verdict. *Maxwell*, 456 P.2d at 486. A partial retrial is permissible only in "exceptional cases," where there is no risk of prejudice to a defendant. See *id.*; *Wolf* v. *Nordstrom, Inc.*, 637 P.2d 1280 (1981); *Tulbert* v. *Farmers Ins. Exch.*, 166 Or. App. 599, 603-04 (Or. Ct. App. 2000) ("Remanding this case for a retrial on punitive damages alone creates the potential for inconsistent verdicts.").

Respectfully submitted.

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
SCOTT A. CHESIN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF FOR RESPONDENT

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
820 S.W. Second Avenue
Suite 200
Portland, OR 97204
(503) 228-5222

ROBERT S. PECK*
ANDRE M. MURA
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2803
robert.peck@cclfirm.com

*Counsel of Record
Additional counsel on inside cover

WILLIAM A. GAYLORD
GAYLORD EYERMAN BRADLEY P.C.
1400 SW Montgomery St.
Portland, OR 97201
(503) 222-3526

CHARLES S. TAUMAN
CHARLES S. TAUMAN, P.C.
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
P.O. Box 11960
Portland, Oregon 97211
(503) 460-2870

QUESTION PRESENTED

The question presented should be stated as:

Whether, after this Court remanded a case with instructions to apply a new standard to be invoked "upon request," a state court may consider state law grounds previously asserted and briefed to decide whether such a proper request was made.

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BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case involves a massive market-directed fraud driven by high-level decisions to deceive customers and knowingly endanger their health in order to generate enormous profits. It constituted one of the longest running, most profitable, and deadliest frauds in the annals of American commerce. Jesse Williams became highly addicted to cigarettes, smoking three packs a day of Philip Morris's "Marlboro" brand, using industry denials, as Philip Morris intended, to rationalize his continued smoking. He died of lung cancer in 1997. Philip Morris, Appendix to the Petition for a Writ of Certiorari, No. 07-1216, 4a-5a (Mar. 24, 2008) (hereinafter "Pet. App.")

For at least 40 years, Philip Morris knew that cigarettes cause lung cancer and that millions of American smokers, about half of whom were its customers, were addicted to the nicotine in cigarettes. Pet. App. 4a-5a. In an effort to maximize profit, Philip Morris either publicly denied this knowledge outright, saying more research was needed, or disingenuously reassured its customers it would never jeopardize their health. Pet. App. 30a-35a. On March 30, 1999, a Multnomah County, Oregon jury found Philip Morris liable on a claim of negligence but also found Jesse Williams was 50 percent negligent. The jury also found Philip Morris liable for misrepresentation. It awarded $21,485.80 in economic and $800,000.00 in non-economic

damages for each claim.[1] The jury declined to award punitive damages on the negligence count. With regard to the misrepresentation claim, the jury specifically found that "defendant ma[d]e false representations concerning the causal link between smoking and cancer upon which Jesse Williams relied" and that "such false representations and reliance [were] a cause of damage to plaintiff, as to cigarettes sold to Jesse Williams on or after September 1, 1988." Joint Appendix, No. 07-1216, J.A. 45a. (Aug. 13, 2008) (hereinafter "J.A."). The jury then awarded $79.5 million in punitive damages in connection with the misrepresentation claim. *Id.* at 46a.

After engaging in a searching review of the record pursuant to this Court's instructions in *Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and after remand from this Court in light of *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), the Oregon Supreme Court in 2006 found Philip Morris's misconduct in this matter to constitute "extreme and outrageous circumstances" and to be "extraordinarily reprehensible, by any measure of which we are aware." Pet. App. 66a. It was only shortly after the March 30, 1999 verdict in this case that Philip Morris publicly admitted that nicotine was addictive and smoking caused lung cancer and other diseases. *See* Barry Meier, "Philip Morris Admits Evidence Shows Smoking Causes Cancer," N.Y. TIMES, Oct. 13, 1999 (available at

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[1] A statutory cap on noneconomic damages reduced the jury's $800,000 verdict to $500,000. Pet. at 2a, citing ORS § 18.560(1).

http://query.nytimes.com/gst/fullpage.html?res=9404E1D91530F930A25753C1A96F958260).

Yet today, some nine years after trial, Philip Morris asks this Court to order an entirely new trial to redetermine whether it is liable even for compensatory damages on the theory that no one can accurately determine what aspect of its misconduct generated the jury's 1999 punitive verdict. Philip Morris, Petitioner's Brief, No. 07-1216, 42-48 (Aug. 13, 2008) (hereinafter "Br."). At the same time, Philip Morris accuses the Oregon Supreme Court of erecting a pretextual barrier to any relief because it invoked a firmly established and regularly followed state rule, which the company asserts was somehow waived—not by Mrs. Williams, but by the Oregon courts themselves.

Both of the Oregon Supreme Court's decisions in this case have been on remand from this Court. After the Oregon Court of Appeals heard the first appeal from the trial court, the state's high court declined discretionary review. *Williams v. Philip Morris, Inc.*, 61 P.3d 938 (Or. 2002). This Court subsequently issued a GVR order in light of its new decision in *State Farm. Philip Morris USA Inc. v. Williams*, 540 U.S. 801 (2003) ("*Williams I*"). The Oregon Court of Appeals and the Oregon Supreme Court then reviewed the case under the federal standards set forth in that case. Neither court addressed the full array of Mrs. Williams' state-law arguments, addressing instead federal issues because the case was remanded on that basis. Philip Morris also assigned the federal issues as error requiring review. After these courts determined that *State Farm* did

not change the result, there was no reason for them to consider Mrs. Williams' state-law objections.

This Court subsequently granted certiorari. After briefing and oral argument, it reversed and remanded. *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007) ("*Williams II*"). In that decision, this Court endorsed the propriety of the Oregon Supreme Court's prior ruling that a "'jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.'" *Id.* at 1064, quoting Pet. App. 48a. It further held that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* Thus, a jury may properly punish the misconduct to reflect the degree of its reprehensibility.

This Court, however, determined that a jury may not go further and directly "punish for harm caused strangers," *Id.* at 1064, because there is "no opportunity to defend against the charge, by showing, . . . that the other victim was not entitled to damages." *Id.* at 1063. It stated that, in "appropriate cases" "upon request," *id.* at 1065, there must be some protection against juries answering the "wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 1064. This Court also found the grounds upon which the Oregon court rejected Philip Morris's Requested Instruction No. 34 to be unclear: although "one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility," "we believe that the Oregon

Supreme Court applied the wrong constitutional standard." *Id.* at 1064, 1065. That belief was based on a footnote in the Oregon court's opinion that opined, "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus," and "[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 1064-65, quoting Pet. App. 49a n.3.

The case was remanded again to the Oregon Supreme Court to "apply the [new] standard." *Id.* at 1065. That standard requires that where the risk of a jury misunderstanding the legitimate role of evidence concerning harm to others is "significant," the trial court "upon request, must protect against that risk." *Id.* The Court, in announcing the standard, indicated that states retain flexibility to decide what kind of process to afford but insisted that states must provide "*some* form of protection in appropriate cases." *Id.*

Upon remand, the Oregon Supreme Court meticulously reviewed this Court's decision and faithfully followed it. *See* Pet. App. 3a, 7a-12a. It recognized that *Williams II* required some protection against jury confusion "upon request," and it considered that requirement first, (Pet. App. 13a n.4), including objections to Philip Morris's requested instruction repeatedly raised by Mrs. Williams. *See* Pet. App. 9a n.2, some of which had been ruled upon by the trial court in Respondent's favor in 1999. The court found that Philip Morris's lengthy instruction misstated Oregon law in several respects, and thus it was not error for the trial court to refuse to give it as proffered.

SUMMARY OF ARGUMENT

For nearly a century, Oregon has required litigants to propose jury instructions that are "clear and correct in all respects." Those who practice law in the Oregon courts are well aware of this principle of party presentation and, accordingly, know that they must separate complex instructions into separate instructional requests with just one main point of law in each instruction. Philip Morris did not do that. Instead, it proffered a single, three-and-a-half page amalgam covering more than 11 different legal points, some contradicting each other and others misstating Oregon law in several important respects. On the "harm to others" question, Philip Morris accepted the trial court's proposed solution and chose not to submit a new instruction focused on the issue.

Philip Morris defends its decision to rely on a patently defective instruction by claiming that the submitted instruction was still sufficient to preserve the error for appeal. In making that argument, Philip Morris misapprehends the import of the "correct in all respects" rule. Under Oregon law, the mere request for an instruction is sufficient to *preserve error* when that request is denied. However, it is *not error* for the trial court to refuse the instruction unless it is correct in all respects. Oregon's courts have uniformly held that there is no error in refusing the requested instruction if it is not "clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975). Before this Court, Philip Morris treats the issue of *preservation of error*, to which they devote

much of their argument, as if it trumps the longstanding "correct in all respects" requirement. That is wrong. Plainly, the error preservation alone does not guarantee reversal. The appellate court must still separately decide whether the trial court erred.

In *Williams II*, this Court said that, in cases involving punitive damages and harm to non-parties, "where the risk of [a jury] misunderstanding is a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, *upon request*, must protect against that risk." *Id.* at 1065 (emphasis added). Responding to that holding the Oregon Supreme Court on remand concluded that it was required to determine whether a proper request was made under Oregon law, because this Court made a "request" a part of the constitutional standard it announced. As Philip Morris now acknowledges, Mrs. Williams repeatedly raised state-law objections based on the "correct in all respects" rule throughout this litigation. Because it had not yet ruled on those arguments, the Oregon Supreme Court reviewed those issues in its most recent opinion to determine whether the trial court committed error in refusing to give Philip Morris's requested instruction.

The court held that Philip Morris did not request an instruction that was correct in all respects. Agreeing with the trial judge that the requested instruction conflicted with the Oregon statute that specifies the criteria for punitive damages, the Court found that the trial judge did not err in rejecting the instruction as proffered. Before this Court, Philip

Morris does not argue that its requested instruction was in fact correct in all respects. Instead, it argues that the trial judge engaged the issue, and thereby preserved it, by ruling against Philip Morris "on the merits." The judge, however, did not rule against Philip Morris on the constitutional issue. She in fact agreed with Philip Morris and said "we are not here to punish for other plaintiffs' harms." The judge suggested language that Philip Morris accepted that addressed its concern. Philip Morris gave the judge no reason to believe that the issue had not been satisfactorily resolved. It also did not draft a new instructional request to reflect its preferred language, even after closing argument, as it certainly could have. It merely took exception, after the jury was instructed, to the failure to give its request No. 34 *as a whole*.

The judge's review of the details of the requested instruction also does not void the "correct in all respects" rule, as Philip Morris now contends. As a practical matter, a charge conference will always go through each party's objections to specific language in any instruction. There is no other way to examine an instruction. It is only on appeal that the "correct in all respects" rule has impact. An appellate court cannot revise an instruction. Instead, it is limited to determining whether the requested instruction was erroneously rejected because it was "correct in all respects." As such, Philip Morris mistakenly treats the rule as a matter of trial procedure, when it is a rule of appellate review.

Despite its protestations about lacking notice of the "correct in all respects" rule, a wealth of precedent supports the rule in precisely the manner in which it was applied in this case. Moreover, Philip

Morris has demonstrated in Oregon and elsewhere that it fully understands how to draft a proper instructional request. In a 2002 Oregon trial, well before what it portrays to this Court as the "novel" 2008 holding by Oregon Supreme Court in this case, Philip Morris requested a series of single-sentence jury instructions that included one on harm to non-parties. In that case, the request was denied by the trial court. The Oregon Court of Appeals disagreed with that ruling. It found it was a proper request, and more importantly, an accurate reflection of the law. The court reversed the judgment against Philip Morris, in part, due to denial of that proffered jury instruction on "harm to others." *Estate of Schwarz v. Philip Morris, Inc.*, 135 P.3d 409, 429 (Or. Ct. App. 2006). Plainly, Philip Morris and its counsel know how to comply with this outcome-neutral requirement.

Philip Morris attempts to excuse its failure to comply with this venerable rule by variously claiming that the Oregon Supreme Court implicitly ruled in Philip Morris's favor on the state-law issues by not ruling on Mrs. Williams' objections when the case was before that court in 2006; that the court waived Mrs. Williams' state-law objections by reaching them only after this Court resolved the federal issues and remanded the case; that the court ruled in a manner that is contrary to other (inapposite) Oregon precedent; or that the Court applied the "correct in all respects" rule in a manner that is unique and unprecedented. Philip Morris also makes the additional claim that this Court's previous review of the federal legal issue necessarily resolved the state-law issues *sub silento* as well. None of these claims survives scrutiny.

Not only are these claims at odds with the position Philip Morris took in oral argument before the Oregon Supreme Court and before this Court, many of them depend on a theory of implicit judicial waiver of an individual's rights, even when that individual has done everything required to preserve those issues. To deny Mrs. Williams a meaningful hearing on these state-law objections would have violated the most elemental form of fundamental fairness that is at the core of the Due Process guarantee.

The "correct in all respects" rule serves legitimate state interests. It reflects the principle of party presentation, which places the onus on the litigants to assure that the jury is correctly instructed. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008). As a result, the trial judge has no obligation to edit, draft, or reform an erroneous instruction requested by a party. In addition, the "correct in all respects" rule serves sound principles of judicial administration by minimizing costly retrials, helping achieve finality in judgments, facilitating the administration of claims, and promoting judicial efficiency.

This Court should reject Philip Morris's ill-conceived bid to make it appear that the Oregon Supreme Court acted in defiance of this Court's earlier decision in this case. Nothing in this Court's decision in *Williams II* or in the Oregon courts previous reviews of this matter warrants the blanket disregard that Philip Morris demonstrated for Oregon's firmly established and regularly followed rule that an appellate court will find no error in a trial court's refusal to give a jury instruction that is not clear and correct in all respects as proffered.

That ruling provides an adequate and independent state-law ground for the disposition of this case. Twelve years after the tragic death that gave rise to this action and nine years after the lengthy trial of this case, with four appellate reviews in Oregon, and five years after the first of three trips to this Court, it is time for this litigation marathon to end. This Court should either dismiss the Petition for want of jurisdiction or affirm the decision of the Oregon Supreme Court.

ARGUMENT

I. PHILIP MORRIS FAILED TO FOLLOW LONGSTANDING AND REGULARLY APPLIED OREGON RULES GOVERNING PROPOSED JURY INSTRUCTIONS

The Oregon Supreme Court held that there was no reversible error in the trial court's failure to give Philip Morris's requested instruction No. 34 because it was not clear and correct in all respects. Pet. App. 21a. For 92 years, under Oregon law, "an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau*, 536 P.2d at 1256. The rule "require[s] that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give." Pet. App. 14a. As such, it is a feature of our adversary system's principle of party presentation. *See Greenlaw*, 128 S.Ct. at 2564. (discussing party presentation principle).

Yet Philip Morris assumes no responsibility for the fact that its proposed jury instruction was erroneous in at least some respects, or for its failure to take any steps to cure these errors by proposing a revised instruction, which it had ample opportunity to do. *See Baker v. Infratech Corp.*, 26 P.3d 835, 842 (Or. Ct. App. 2001) ("If a party wishes to rely on the failure to give a requested instruction at trial as error on appeal, it must formulate a *correct* instruction and request that the trial court give it.") (emphasis added). Yet, Philip Morris never submitted a second proposed instruction accounting

for state-law defects identified by the trial judge in its only submission on punitive damages..

Philip Morris attempts to excuse its neglect by treating the "correct in all respects" rule as merely an error-preservation requirement and not, as it is, a substantive rule of appellate review. Philip Morris erroneously asserts that this Court found that it made "clear at the charge conference its position on the federal issue." Br. 12. For that reason, a review of the record is necessary.

A. PHILIP MORRIS DISTORTS WHAT HAPPENED AT TRIAL AND IN THE SUBSEQUENT APPEALS

Philip Morris significantly mischaracterizes its position before the trial court and the holdings below in an effort to excuse its failure to comply with a longstanding Oregon rule and falsely claim that any attempt to follow standard state practice would have been futile. The record, however, supports the Oregon Supreme Court's review of the state-law issues on remand, issues it resolved in a manner consistent with *Williams II*.

1. The Trial Judge Did Not Rule that a "Harm to Non-Parties" Instruction Was Not Constitutionally Required, But Considered the Issue Settled by Alternate Language that Philip Morris Endorsed

Philip Morris tells this Court eight times that the trial court ruled against its requested "harm to others" language on the merits. Br. 4, 10, 13, 28, 29,

30, 31, & 33. Instead, the charge conference transcript reveals that Philip Morris expressed satisfaction with the trial judge's resolution of the issue.[2] The judge clearly believed that the concern articulated by Philip Morris was fully addressed, so that there was no need to rule on any constitutional issue:

> In terms of instructing the jury that when they punish, they shouldn't be compensating for other claimants who haven't yet come to court, to me, that is addressed in part because we are first —we have already told the jury that punitive damages are not compensatory damages. I would maybe say — . . . They are not compensatory. They are punitive. They are designed to punish and deter and, therefore, they are not designed to compensate for other plaintiffs who aren't here, and they are not designed to compensate this plaintiff.

J.A. 19a.

Philip Morris responded to this statement by recognizing that the judge's language conformed to the state statute, which declared the purpose of punitive damages to be punishment and deterrence,

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[2] In addition, Philip Morris's requested Instruction No. 34 presented the judge with alternative paragraphs denominated as "1," indicating that either one satisfied their concern. While the first version contained the language reviewed by this Court in *Williams II*, the second version re-expressed the concern as one relating only to "the impact of its conduct on individuals in other states." J.A. 32a. Both expressed concerns were covered by the instruction actually given. J.A. 36a-37a.

but then suggested without citing any authority, "I suppose you could declare the statute unconstitutional at some level, but under the Oregon statute that is in the proposed jury instruction the plaintiff has proffered, this element is not there." J.A. 20a. The judge, however, found the "harm to others" element accounted for:

> the risk is adequately guarded against by telling the jury punitive damages are not designed to compensate any one plaintiff or any one—if you want to maybe introduce "compensate plaintiff or anyone else for damages caused by defendant's conduct," if that gets you where you need to be.

Id. Defense counsel responded, "Okay." *Id.* To be sure that Philip Morris was satisfied with this language, the judge then asked whether "plaintiff or anyone else" was preferable to "plaintiff" alone." *Id.* Philip Morris replied, "I would go with the phrase 'or anyone else.'" *Id.* This led the judge to conclude Philip Morris's concern had been addressed: "I think I have satisfactorily worked my way through your Element No. 1." *Id.* Philip Morris voiced no disagreement. Later, the court reaffirmed, "You won the point that punitive damages have to arise from the defendant's conduct which is causally connected to the claim for relief, and that's covered."[3] J.A. 25a; *see also id.* at 28a ("COURT: Well, I would modify even yours, Mr. Beattie, to say, in quotes, 'In

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[3] Earlier in the charge conference, the trial judge agreed with Philip Morris that "we are not here to punish for other plaintiffs' harms ... We are here to punish—if we are here at all to punish, . . . for the conduct that caused harm to Jesse Williams." J.A. 12a.

engaging in conduct which was a cause of damage to Plaintiff,' . . . to be consistent.").

There simply was no trial-level ruling rejecting the Philip Morris position on "harm to others" because the court believed it had satisfactorily addressed the issue. Philip Morris gave the trial judge no reason to believe otherwise.

Philip Morris also claims that the Oregon Supreme Court "recognized" that the trial court "had denied Philip Morris's federal claim on the merits." Br. 10. The supreme court never said that. Instead, the court specifically rejected Philip Morris's claim that submitting a properly worded instruction would have been "futile," given how "soliticitous" the trial judge was. Pet. App. 16a n.5.

The record demonstrates that the trial court rejected Philip Morris's No. 34 as a whole on the basis of multiple valid independent state-law grounds: parts of it were covered by other instructions, J.A. 23a ("the point is adequately conveyed. There is nothing new in lines 13 through 19"); parts were argumentative comments on the evidence, J.A. 21a ("Your Paragraph 1 on Page 2 is closing argument"), J.A. 25a ("I don't see anything on Page 3 or 4 that isn't argumentative-counsel material, commentary on the evidence by the Court"); and parts misstated applicable state law. *Id.* ("I'm not telling the jury that it is an illicit profit. That's not part of the statute.").

At the same time, the trial judge invited Philip Morris to submit a new draft instruction on an issue not yet adequately covered. J.A. 22a. Clearly, Philip Morris had ample opportunity to comply with state-

law requirements and submit an instruction relating to harm to others. Instead, Philip Morris expressed satisfaction with the resolution of this issue and only after the jury was instructed took exception for failure to give its instruction No. 34 *as a whole*. J.A. 38a. It never specified what part of No. 34 was at issue and never disputed the validity of the judge's other rulings on the instruction, any one of which was sufficient to deny the request under Oregon law. *See Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972) (citations omitted) ("trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors"). Thus, even if Philip Morris had preserved its objection to the failure to give its instruction as submitted, the trial court is properly affirmed unless the instruction was correct in all respects.

2. Philip Morris's Misreading the Record Arises from Its Shift of Position on Appeal

Philip Morris did not assign error to the trial court's failure to use its "harm to others" language. In its first appeal, it instead said the trial judge should have instructed the jury "that its award should bear a reasonable relationship to the harm caused to Williams." Pet. App. 140a-141a. It was in response to a claim that the jury must be told "about proportionality" even if the issue is normally handled "post-verdict," that the judge asked, "why wander where no judge has been told to go before?" J.A. 16a, 17a. After this Court's *State Farm* remand, Philip Morris began shifting its argument from "reasonable relationship" to "harm to others." However, it continued to rely on the trial court's rejection of the

"reasonable relationship" language through oral argument in the Oregon Supreme Court. App. 11a-15a.[4] That is the source of its incorrect contention that the trial court refused to instruct on "harm to others." The trial court's refusal concerned a distinct and separate topic.

3. Philip Morris Conceded that the State Law Issues Were Unresolved and Ripe for Decision by the Oregon Supreme Court

Before this Court this time, Philip Morris makes strenuous protestations that the state-law flaws in their request for an instruction were implicitly resolved, either by the Oregon Supreme Court during earlier reviews, Br. 25 ("they rejected that claim on the merits"), or by this Court, Br. 19, 21 ("the majority implicitly rejected that forfeiture argument"). Thus, they contend that the Oregon Supreme Court's 2008 decision considering those flaws "appears to be nothing more than a pretext for refusal to protect Philip Morris's due process rights" and "effectively re-examine[s] the underpinnings of this Court's decision—and exceed[s] its authority." Br. 2, 21.

In both arguments before the Oregon Supreme Court, however, Philip Morris sang a different tune. After the first remand, Justice Durham asked, "Is it your position that the remand for reconsideration in light of *State Farm* alters or relieves any preservation requirements that Oregon law might

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[4] Associated Oregon Industries *et al.* makes the same mistake in its current briefing. Amicus Br. of Assoc. Ore. Indus. at 8.

apply?" Philip Morris's counsel answered, "No, it does not relieve. No, it does not. The same preservation rules require an issue that is not adequately preserved can be rejected by this court and that would be an adequate state ground." App. 3a.

The issue was broached again after the *Williams II* remand. Justice Durham emphasized that "[w]e are just talking about the adequacy of the offered instruction from your client" and not about "charges that Oregon's procedures for the drafting and submission of jury instructions and the approval of jury instructions by the trial court . . . is somehow invalid, are we?" Philip Morris's counsel agreed.[5] When asked, whether Philip Morris "had a full opportunity to submit whatever instructions it wished and to get a legally correct instruction delivered by the trial court," counsel answered, "Yes." App. 4a-5a.

In its most recent argument in this case, confronted with whether state-law objections were sufficient to determine the cause, Philip Morris pinned its argument on a claim that those objections were not properly raised. Justice Durham then asked whether the "principle of correct in all respects is not the law?" Rather than argue, as it does now, that such objections had been overruled or waived, Philip Morris merely challenged whether the "correct in all

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[5] In the oral argument in *Williams II*, Philip Morris counsel similarly agreed with Justice Scalia when the justice said the Oregon Supreme Court could still nonetheless "disallow the instruction for a different reason," if the Court ruled in Philip Morris's favor on the federal issue. App. 1a-2a. ("calling that view "correct").

respects" rule still obtained as a matter of Oregon law: "I don't believe, I believe that that is the law qualified by not only *[State v.] George[*, 97 P.3d 656 (Or. 2004)] but the cases that came before it that talk about the reason for the preservation rule." App. 4a-6a.

Thus, before the Oregon Supreme Court, Philip Morris did not challenge the court's authority to rule on Mrs. Williams' state-law objections; it instead asserted that she had either failed to preserve those objections,[6] something it no longer contends, *see* Br. 25 n.7, 42, or was wrong on the applicable state law. It did not assert that the state-law arguments had been decided by this Court or the Oregon courts, as it does now. Instead, it contended that it had fully complied with state law because it mistakenly believed that *George* retroactively relieved it of its burden under the "correct in all respects" rule. The Oregon Supreme Court, however, decided that Philip Morris was wrong on the merits of the state-law issues. That decision is an adequate and independent ground to reach a final disposition in this case.

B. PROPOSED INSTRUCTION NO. 34 CONTAINED MULTIPLE SUBSTANTIVE AND PROCEDURAL FLAWS

The trial court rejected Philip Morris's four-page amalgam that covered at least eleven different legal issues on multiple grounds. *See* J.A. 21a, 23a, 25a.

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[6] The Oregon Supreme Court noted that Mrs. Williams had argued alternative state-law grounds for rejecting the proposed instruction, but that the court had not previously reach them because it believed its federal ruling was sufficient. Pet. App. 9a n.2.

The Oregon Supreme Court based its most recent decision on one of the legal flaws in the instruction identified by the trial court and another reason argued by Mrs. Williams on appeal. Pet. App. 15a. Philip Morris has not seriously disputed the merits of these holdings, but has instead sought to dismiss them as tangential "trivialities." Philip Morris, Petition for a Writ of Certiorari, No. 07-1216, 25 (Mar. 24, 2008) (hereinafter "Pet.").

Still, it should not go unremarked that Philip Morris is wrong when it insists that this Court found their language "accurately stated due process requirements."[7] Br. 21. As Justice Ginsburg pointed out, this Court "ventured no opinion on the propriety of the charge proposed by Philip Morris" and that a "judge seeking to enlighten rather than confuse surely would resist delivering the requested charge."[8] *Williams II*, 127 S.Ct. at 1069 (Ginsburg, J., dissenting).

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[7] The instruction would have told the jury to consider harm to others on the question of proportionality. In *Williams II*, this Court made it clear that harm to nonparties may be considered by a jury in evaluating the reprehensibility of defendant's misconduct but that the jury may not punish directly for harm that misconduct causes to nonparties. 127 S.Ct. at 1064. Defendant's Request No. 34, however, would have (1) omitted any mention of considering harm to others to determine reprehensibility and (2) told the jury that it could consider harm to others in determining the reasonableness of the relationship — the "ratio" — of punitive to compensatory damages. Either flaw further supports the trial court's refusal to give the jury that instruction as written. Respondent's repeated assertions that subparagraph 1 of its request No. 34 "correctly stated federal law" are false. Br. 7, 12, 14, 21, 27-28, 33, 35, 44.

[8] At oral argument in this Court, Justice Souter also found the language of the proposed instruction bothersome, noted that

1. Petitioner's No. 34 Misstated the Relevance of the Oregon Statutory Factors

The Oregon legislature has mandated that punitive damages, if any, "*shall* be determined and awarded based upon" specific enumerated statutory criteria. ORS § 30.925(2) (emphasis added). The statute is mandatory and exclusive, providing the only criteria on which the determination and award of punitive damages "shall be" based. Philip Morris's No. 34 proposed making that mandatory language permissive by advising that the jury "may find" the factors useful in assessing reprehensibility and leaving the door open to other unspecified factors. Pet. App. at 3a. Even the language at the core of its petition to this Court was qualified as a factor that "you [the jury] may wish to consider," thereby allowing the jury discretion to punish for harm to others. J.A. 31a. To allow the jury such arbitrary leeway to devise their own criteria, as Philip Morris's language would have permitted, would not only have been error under ORS § 30.925, it also implicates this Court's concern with "'arbitrary punishments,' . . . that reflect not an 'application of law' but 'a decisionmaker's caprice.'" *Williams II*, 127 S.Ct. at 1062 (quotation omitted). The trial court properly rejected it, and the Oregon Supreme Court properly agreed. Pet. App. 19a.

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it was "probably an unsound request," and said, "I have great difficulty in seeing how I could find that it was error to refuse to give the instruction." App. at 1a. Philip Morris's counsel admitted, "Maybe it could be edited up to be a little sharper." App. at 2a.

2. Petitioner's Request No. 34 Misstated the "Profit" Factor

The Oregon Supreme Court held that Instruction No. 34 was wrong because it would have advised the jury that cigarette sales are legal and that the jury should consider only the defendant's motivation to secure "illicit" profits, misstating the statutory factor, as the trial court also ruled. Pet. App. 20a-21a, J.A. 25a-26a. ORS § 30.925(2)(c) requires that the fact finder base its determination and award of punitive damages on "the profitability of the defendant's misconduct," if any. The statutory factor is "profitability," not "motive to profit" and not "illicit profits." The trial court properly rejected Petitioner's No. 34 for this reason alone. The Oregon Supreme Court properly agreed. Pet. App. 20a-21a.

3. Requested Instruction No. 34 Would Have Tied the Amount of Punitive Damages to the Extent of Public Knowledge about the Risks Associated with Smoking

Philip Morris's proposed instruction was defective in several other respects that the Oregon Supreme Court did not reach, but that Mrs. Williams argued. J.A. 85a. She objected to Requested Instruction No. 34, in part, because it erroneously tied the amount of punitive damages to the extent of public knowledge about the dangers of smoking. In suggesting that the jury limit any punitive damages "to the extent that the risks from smoking were not a matter of general public knowledge," J.A. 31a, Philip Morris sought to introduce an idea that was not only unprecedented and confusing, but wrong in a way that would have contradicted the very idea on which it now relies.

The instruction says, in effect, "You may punish for harm to others to the extent that the public was misled about the dangers of cigarettes." Thus, proposed No. 34 would have asked the jury to assess punishment to the extent that nonparties were defrauded – or others were harmed. That is exactly what this Court prohibited.[9]

4. Philip Morris's No. 34 would have encouraged the jury to punish for harm to others

The last sentence of Requested Instruction No. 34 also contradicts this Court's central holding in this case. In discussing the relevance of defendant's financial condition[10] to the amount of punitive damages, request No. 34 says:

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[9] Further, as Mrs. Williams pointed out, this part of proposed No. 34 would have allowed punitive damages only on plaintiff's fraud claim. The claim for negligence would also have supported punitive damages, though the jury did not ultimately award punitive damages on that claim. Pet. App. 37a. There was no legal basis to limit punitive damages to the fraud claim as the proposed instruction would have done by limiting punitive damages to punish for risks that were "unlawfully misrepresented by the defendant."

[10] Before this Court last term, Respondent pointed out the contradictory treatment of the defendant's "financial condition" as both proper and improper at once. *Compare* J.A. 31a with J.A. 33a (paragraphs 6 with 11). Williams, Respondent's Brief, 05-1256, 48 (Sept. 15, 2006). While Philip Morris responded that the paragraphs were alternative language, Philip Morris, Petitioner's Reply Brief, 05-1256, 6 n.4 (Oct. 17, 2006), the paragraphs were plainly not alternatives but were intended to coexist. The self-contradictory nature of this treatment of "financial condition" also provides adequate grounds for the Oregon courts to reject the requested instruction.

> Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. . . . [Still,] the paramount consideration remains the degree of reprehensibility of any misconduct and *the extent of any harm caused by such misconduct.*

J.A. 33a (emphasis added). The instruction supplements reprehensibility with another "paramount consideration," "the extent of *any* harm caused by the misconduct." The language would permit the jury to punish for any harms without qualification, creating precisely the risk that the jury might punish defendant "directly [for] . . . harms it is alleged to have visited on nonparties." *Williams II*, 127 S.Ct. at 1064. The trial court did not err in refusing to give this requested instruction.[11]

C. OREGON LAW REJECTING SUCH FLAWED JURY INSTRUCTIONS IS FIRMLY ESTABLISHED AND REGULARLY FOLLOWED

This Court has made clear that "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim." *Lee v. Kemna*, 534 U.S.

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[11] Oregon law also holds that an incomplete instruction is properly refused "even though other instructions given may supply the omitted part of the requested instruction." *Stanich v. Buckley*, 368 P.2d 618, 621 (Or. 1962). Requested Instruction No. 34, *inter alia*, failed to instruct the jury on the proper uses of "harm to others" evidence. Such an instruction is necessary to clarify that the jury may consider such evidence in assessing reprehensibility.

362, 376 (2002), quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984). That statement acknowledges, as this Court has done on repeated occasions, that this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground. *See Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

It is only in a "limited category" of "exceptional cases," essentially when a court engages in an "exorbitant application of a generally sound rule," that a state bar may prove inadequate. *Lee*, 534 U.S. at 363. Established state rules have been set aside as inadequate only when they appear calculated to discriminate against federal law, or, as one leading treatise puts it, fail to afford a litigant "a reasonable opportunity to assert federal rights." 16B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 4027, at 392 (2d ed. 1996) (hereinafter Wright & Miller). *See, e.g., Douglas v. Alabama*, 380 U.S. 415, 422-23 (1965) (rule requiring continuous repetition of identical constitutional objections); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (rule waiving jurisdictional objections upon entry of appearance of federal defendant's successor-in-interest). This is not one of those exceptional cases.

1. Philip Morris Had Ample Notice of the "Correct in All Respects" Requirement

To be valid, this Court has held that the state rule must not be novel or sprung upon a litigant without notice, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958) or amount to an "arid ritual of meaningless form." *Staub v. City of Baxley*, 355

U.S. 313, 320 (1958). Oregon's "correct in all respects" rule does not fit within those exceptional categories. It has been consistently applied in at least 26 cases over the last 92 years. *See* App. 24a-26a (listing cases). Philip Morris's repeated claims that it "lacked fair notice" of the rule cannot be sustained. Br. 13, 26, 35, 39.

The rule was considered "well settled" nearly 50 years ago. *Wiebe v. Seely*, 335 P.2d 379, 393 (Or. 1959). Indeed, it was first adopted by the Oregon Supreme Court 92 years ago in *Sorenson v. Kribs*, 161 P. 405, 409-410 (Or. 1916), where the issue was whether a flawed instructional request still sufficed to "call the attention of the court to the matter" or, on the other hand, whether it could be properly denied for those flaws. Siding with the "great weight of authority," the Oregon Supreme Court held:

> In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error.

Id. at 410. (quotation omitted).

Since then, Oregon courts have consistently insisted that requested instructions be clear and correct in all respects, including in a decision one year before trial in this case. *See Hernandez v. Barbo Machinery Co.*, 957 P.2d 147, 151 (Or. 1988). Thus, instructions that contained valid elements are still

properly refused because of "objectionable language," *Simpson v. Sisters of Charity of Providence in Oregon*, 588 P.2d 4, 13 (Or. 1978); because they called upon the jury to make inferences outside the pleadings, *Dacus v. Miller*, 479 P.2d 229, 231-32 (Or. 1971); because they failed to "embod[y] the essentials as set out" in the relevant statute, *McCaffrey v. Glendale Acres Inc.*, 440 P.2d 219, 222 (Or. 1968); and because they contained erroneous descriptions of the relevant statute. *Roop v. Parker Nw. Painting Co.*, 94 P.3d 885, 904 (Or. Ct. App. 2004). Abundant Oregon authority reiterates the rule. *See* Williams, Appendix to Brief in Opposition, No. 07-1216, 27a-28a (Apr. 23, 2008) (hereinafter "Opp. Cert. App."). Requested instruction No. 34 contained multiple fatal flaws that the Oregon courts and Mrs. Williams had identified. *See* pp. 20-25 *supra*. Philip Morris has no claim that it lacked notice of this longstanding rule's application.

Nor was the rule given "hyper-technical application" here, as Philip Morris claims. Br. 36. Rather, it was applied in a manner familiar to all Oregon lawyers. Oregon practice materials (including one co-authored by Philip Morris's trial counsel in this case)[12] uniformly advise trial counsel they should not intermix different legal propositions

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[12] Oregon State Bar, APPEAL AND REVIEW § 14.74 (2002 Supplement) (citing *Hernandez v. Barbo Machinery Co.*, 957 P.2d 147 (Or. 1998) and stating "if it would be error to give any part of proposed instruction, court does not err in refusing to give instruction," written by Jay Beattie, Meagan Flynn, and Gene Hallman). Mr. Beattie argued the jury instruction issue for Philip Morris at trial. J.A. 11a-29a.

within a single requested jury instruction.[13] Philip Morris easily could have submitted a revised request, and its argument that such an effort would have been futile or useless is, on this record, wholly unsupported.

2. Circumstances Did Not Justify an Exception to the Rule

While there are instances when an otherwise legitimate rule might operate improperly and cause the state law bar to fall outside those this Court must respect, this is not one of those cases. In *Lee*, for example, an "unusual sequence" of "rapidly unfolding events that [the litigant] and his counsel could not have foreseen, and for which they were not at all responsible" placed the case "within the small category of cases in which asserted state grounds are inadequate to block adjudication of a federal claim." 534 U.S. at 378, 381 (internal quotations omitted). Three essential factors distinguish *Lee*. First, the trial judge denied Lee's motion on grounds that not even perfect compliance with the procedures could have overcome. *Id.* at 381. Second, "no published [state] decision direct[ed] flawless compliance." *Id.* at 382. Finally, "and most important, given 'the realities of trial,' Lee substantially complied with [the state's] key Rule." *Id.*

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[13] *See, e.g.*, Oregon State Bar, APPEAL AND REVIEW § 9.23 (2006) ("On review, jury instructions are to be considered as an entirety."), citing *Parmentier v. Ransom*, 169 P.2d 883 (Or. 1946); Oregon State Bar, CIVIL PLEADING AND PRACTICE § 39.7 (2006) ("separate complex instructions into several consecutive instructions . . . [to] reduce the likelihood that the trial court will reject an entire multifaceted special instruction.").

In contrast with *Lee*, the experienced and well-resourced party and its counsel in this case were not surprised by any rapidly unfolding turn of events beyond their control. Instead, Philip Morris offered a deliberately drafted, multi-subject instruction—and then expressed satisfaction with the trial judge's resolution of the "harm to others" issue. J.A. 20a. Also unlike *Lee*, the trial judge here did not deny Philip Morris's requested instruction on grounds that could not be overcome by compliance with the pertinent Oregon rule. After the closing arguments that triggered this Court's concern last time, Philip Morris could have offered an instruction limited to the "harm to others" issue, which would have allowed it to assert error in its denial. That type of compliance with the rule would have removed the state-law objections that are central to the current dispute.

Moreover, Philip Morris has demonstrated in trying other cases in Oregon that it understands the rule. In the 2002 trial of *Estate of Schwarz v. Philip Morris, Inc.*, No. 0002-01376, Philip Morris submitted multiple, separate jury instructions on punitive damages, including one that simply stated, "You are not to impose punishment for harms suffered by persons other than the plaintiff before you." App. 22a. The Oregon Court of Appeals found error in the trial court's refusal to give that instruction. 135 P.3d 409, 429 (Or. Ct. App. 2006). Plainly, the Oregon courts are not hostile to Philip Morris or this due-process principle. They merely insist on following procedures, and Philip Morris has demonstrated that it does know how to do so.

In this case, however, Philip Morris's lack of substantial compliance with the rule is palpable and cannot be explained away by the "realities of trial."

3. *State v. George* is Inapposite

Philip Morris claims that Oregon does not regularly follow the "correct in all respects" rule, accusing the Oregon Supreme Court of failing to apply the *George* decision. *See* Br. 36.[14] The argument is unavailing. *George* involved a statute that "unequivocably places the responsibility for giving the requested instruction on the trial court, without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." 97 P.3d at 661-62. It was therefore irrelevant whether defendant had requested a correct instruction or whether he submitted any request at all. The court's observation upon which Philip Morris relies, concerning the futility of submitting a revised instruction when the trial court said any instruction would be unconstitutional, were therefore *dicta*. *Id.* Moreover, because no similar ruling occurred here, the observation is utterly inapplicable.

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[14] Philip Morris originally relied upon *George* in its opening brief before the Oregon Supreme Court after remand in light of *State Farm* solely for the proposition that the "correct in all respects" rule didn't matter because it objected to the instruction actually given. App. 16a-17a. It was only after the Oregon Supreme Court held that Philip Morris had failed to preserve any error in the instruction given, Pet. App. 52a, that Philip Morris devised its "futility" claim based upon *George*.

Philip Morris argues that *George* is simply the culmination of a "long line of Oregon cases," citing just five cases, only one of which involved jury instructions. Br. 37 n.9, citing *Oregon v. Brown*, 800 P.2d 259, 266 (Or. 1990) (failure to instruct on causation in aggravated murder case); *Oregon v. Hitz*, 766 P.2d 373, 376 (Or. 1988) (acquittal for failure to prove element of crime); *Oregon v. Mack*, 183 P.3d 191, 194 (Or. Ct. App. 2008) (failure to prove element of crime in trial without jury); *Oregon v. Doern*, 967 P.2d 1230, 1233 (Or. Ct. App. 1998) (improper time limit on closing argument); *Oregon v. Martin*, 897 P.2d 1187, 1189 (Or. Ct. App. 1995) (argument concerning suppression of evidence not preserved).

George, however, is not a "correct in all respects" case and does not address the application of that rule. The case centered on a criminal statute that placed the onus of proposing instructions on trial courts and not on parties. Philip Morris's position that *George dicta* should nullify the "correct in all respects" rule *sub silento* should be rejected. The "correct in all respects" rule has been consistently applied for nearly a century, both before this case's trial and subsequent to *George*. *See, e.g., Moe v. Eugene Zurbrugg Const. Co.*, 123 P.3d 338, 345 (Or. Ct. App. 2005). It was appropriately applied here.

Even if *George* could be read to create a futility exception, no futility is evident here. The trial court did not refuse to address Philip Morris's "harm to others" concern and sought and obtained Philip Morris's approval of language to address it. The Oregon Supreme Court specifically found that Philip Morris's complaint of "futility" was groundless on this record. Pet. App. 16a n.5. That determination is

dispositive. *See Osborne v. Ohio*, 495 U.S. 103, 123 (1990). Philip Morris had ample opportunity to file a correct request for the instruction.

D. THE "CLEAR AND CORRECT IN ALL RESPECTS" RULE WAS APPLIED IN ITS TRADITIONAL MANNER

Philip Morris attacks Oregon's "correct in all respects" ruling by asserting that it "marks the *first* and *only* time in any reported Oregon decision that an appellate court has rejected an instruction on one subject, . . . simply because it appeared under the same heading as a defective instruction on an entirely distinct point of law." Br. 13. Thus, Petitioner does not assert, as it did in its Petition, Pet. 25-27, that the "clear and correct in all respects" rule is novel,[15] not firmly established, or not regularly followed, because such an attack on a nearly century-old, standard part of Oregon practice cannot be plausibly maintained. Instead, its real complaint is that the rule was applied differently in this case than it has applied in others.

Unlike Mrs. Williams, Philip Morris chose to depart from the approved standard punitive damage

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[15] In Philip Morris's Question Presented in its Petition, it asserted that the "correct in all respects" rule was interposed "for the first time in the litigation" by the Oregon Supreme Court's most recent decision. Pet. i. That contention was dropped from the Question Presented (Pet. i) and from its Brief on the Merits entirely, for good reason. *See* Williams, Brief in Opposition, No. 07-1216, 15-16 (Apr. 23, 2008) (hereinafter "Opp. Cert.").

jury instruction by rewriting it entirely.[16] In Oregon, departures from standard jury instructions receive intense scrutiny, because it is well-known that instructions offered by parties are almost always slanted in some way.[17] As a result, the Oregon Supreme Court has uniformly held that a "requested instruction [must be] clear and correct in all respects, both in form and in substance, and [is properly denied] unless it is altogether free from error." *Beglau*, 536 P.2d at 1256 (citations omitted). Trial courts "cannot be required to edit requested instructions and to omit parts that are incorrect or inapplicable." *Id.*

Nonetheless, Philip Morris tells this Court that

> in every decision applying the "correct in all respects" rule dating back at least to the 1916 *Sorenson* case, the issue was whether the proposed instruction's treatment of a particular subject was a correct statement of the specific legal proposition the litigant was raising on appeal.

Br. 40. Plainly, the rule applied in Oregon and other jurisdictions requires a proposed instruction be "clear

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[16] It is axiomatic that "many states with pattern or standardized instructions either require or strongly recommend that they be used when available." Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1086 (2001).

[17] Philip Morris's attempt to advise the jury that it may only punish the company for its motivation to obtain "illicit" profits, while also reminding the jury that cigarette sales are legal in Oregon, is an example of seeking just such an improper advantage. J.A. 30a-32a.

and correct in *all* respects," not merely that aspect which is the subject of appeal. The primary purpose of the rule — to require the requesting party to insure that the instruction comports with all applicable law and avoid imposing editorial duties on trial judges — would be undermined entirely by the rule that Philip Morris now proposes. No rule is necessary if a litigant misstates the central legal dispute in the proffered instruction; it is only of moment if the instruction as a whole is defective.

Philip Morris's approach, at odds with the rule's plain meaning, as well as Oregon practice guides that constantly remind counsel to separate their requests into distinct propositions,[18] would turn the "correct in all respects" rule into one that merely requires the instruction be correct in *some respect*.

No jurisdiction that has ever followed the rule has read it in the limited fashion Philip Morris suggests. *See, e.g., Beaver v. Taylor*, 93 U.S. 46, 54 (1876) (emphasis added) (no error in refusing an instruction where it "was presented as one request; and, *if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained.*"); *Harvey v. Tyler*, 69 U.S. 328, 338 (1864) ("court did not err in refusing the prayer, although there might have been propositions in the series, which, if asked

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[18] *See, e.g.*, Oregon State Bar, CIVIL PLEADING AND PRACTICE § 39.7 (2006):

> PRACTICE TIP: The lawyer should separate complex instructions into several consecutive instructions with just one main point of law contained in each instruction. This practice will reduce the likelihood that the trial court will reject an entire multifaceted special instruction.

separately, ought to have been given"); *Wiley v. Young*, 174 P. 316, 317 (Cal. 1918) ("If the instruction was offered as a whole, then, if any one of these paragraphs is erroneous, the whole was properly refused."); *Duncan v. Strating*, 99 N.W.2d 559, 562 (Mich. 1959) (quotation and citation omitted) ("A trial judge may properly decline to give a requested charge which includes an erroneous proposition, and does not commit error in failing to rewrite the request in proper language.").

More critically, Oregon has consistently applied the rule as it was applied in this case, where the basis for rejecting the instruction was different than the legal point raised by appellant. *See Oregon v. Reyes-Camarena*, 7 P.3d 522, 528 (Or. 2000) (no error in refusing to give proper "mitigating factors" instruction when combined with improper death penalty "sympathy" instruction); *Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972) (proposed instruction properly rejected even if correct about third-party liability but incorrect by also requiring that defendants' negligence be the sole cause of damage); *Schultz v. Shirley*, 220 P.2d 86, 88 (Or. 1950) (denying error in refusal to give "requested instruction [that] includes three different propositions," one of which was erroneous); *Hotelling v. Walther*, 148 P.2d 933, 935-36 (Or. 1944) (proper "less satisfactory evidence" instruction properly rejected because it was part of a request that included other instructions irrelevant to the case); *Burke v. American Network, Inc.*, 768 P.2d 924, 926-27 (Or. Ct. App. 1989) (both plaintiff's and defendant's proposed instructions properly rejected, even if correct on one point, because they were incorrect on others).

Philip Morris cites several cases without analysis that supposedly support its contrary proposition. Br. 40 n.10. The cases, however, lend no support to its contention. *See Beglau*, 536 P.2d at 1256 (where the court held that a requested instruction would have provided no basis for appeal because two of the six legal requirements it contained "have no application to this case" and would have required the trial court "to make various deletions in preparing an appropriate instruction."). *See also Owings*, 497 P.2d at 1188 (one of two unrelated portions of requested instruction was incorrect and trial court is not obliged "to give the correct portions of one which includes errors.").

Defendant's claim that Oregon has never rejected an instructional request because of the inaccuracy of other parts of the request is erroneous. The Oregon Supreme Court has consistently rejected appeals involving jury instructions for the longstanding and well-recognized reason that they are not correct in all respects, that a trial court is not required to give correct portions of an instruction that includes errors in other respects, related or not, and that the trial court therefore does not err in refusing to give such instructions.

E. PHILIP MORRIS MISUNDERSTANDS THE MEANING OF THE RULE

Philip Morris makes two other arguments based on a misapprehension of the "correct in all respects" rule. First, it treats the trial court's consideration of its request "line by line" as voiding the operation of the rule. Second, it conflates the rule with rules concerning preservation of error.

1. The "Correct in all Respects" Rule is a Rule of Appellate Practice

Philip Morris argues that the trial court's line-by-line consideration of its request No. 34 somehow voids the operation of the "correct in all respects" rule, or distinguishes this case from the long line of others applying the rule as the Oregon Supreme Court did here. Br. 39-40. The reality of trial practice reveals, however, that contested jury instructions are typically considered "line by line." There is no other useful way to discuss them. Parties routinely argue over the specific language of their opponents' requests. Particular words are contested, compromises reached, and rulings made based on advocates' perceived nuances of meaning and advantage, as well as trial judges' ideas of balance and fairness. Unless an instruction is completely inapplicable to the facts, its specific language is what the court and counsel discuss in any charge conference. The trial court's consideration of specific language is hardly unique to this case.

Even so, Philip Morris misapprehends the nature of the rule because it is not a rule of trial court procedure, but a principle of appellate review that promotes judicial efficiency and imposes on parties responsibility to submit fully accurate jury instruction requests at trial. It is evident from the normal piecemeal consideration of instructional requests in the trial courts that the rule is not a rule to be applied at trial. Otherwise a single flaw would render consideration of other parts superfluous. In response to objections, trial courts require explanation as to what, precisely, is wrong with a request. Rejecting that portion does not end the task,

as courts continue to move word by word through the requests. To be sure, the trial court is not required to edit instructional requests for the parties, but in practice, the court and the parties work together to reach either accommodation or a definitive ruling on the language of a particular instruction. Though it is not required to, the trial court has the opportunity, with the parties' help, to craft an instruction which it believes will remove the instruction as an issue on appeal. An appellate court, of course, cannot do this.

It is on appeal that the "correct in all respects" rule becomes relevant. At that point, nothing can be done to alter the language of an instruction the trial court rejected. The rule applies to define what is or is not trial court error — to allocate among the parties the risk of reversal or affirmance: it "require[s] that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give." Pet. App. 14a; *cf. Greenlaw*, 128 S.Ct. at 2564. Yet Philip Morris assumes *no* responsibility for the fact that its proposed jury instruction No. 34 was erroneous in multiple respects and assumes *no* responsibility for its failure to take any steps to cure these errors.

Because trial court judges are under no obligation "to correct or edit the portions of [a proposed] instruction that are in error or inapplicable," *Beglau*, 536 P.2d at 1256; *Owings*, 497 P.2d at 1188. Philip Morris has only itself to blame for its erroneous statements and for choosing to stand by its original proposed instruction rather than correct its defects.[19]

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[19] Philip Morris appears to have considered redrafting. After the trial court determined that instruction No. 34 was erroneous in part because of its language about illicit profits,

It conceded as much on remand to the Oregon Supreme Court, when it admitted that "[t]here probably are other ways that one party or defendant could raise the need for [due process] protection." App. 5a-6a. (counsel for Philip Morris). In contrast, Philip Morris revised its proposed jury instructions in *Bullock v. Philip Morris USA, Inc.*, 71 Cal. Rptr. 3d 775, 797-98 (Cal. App. 2 Dist. 2008), *five times*.

The law in Oregon is clear: "If a party wishes to rely on the failure to give a requested instruction at trial as error on appeal, it must formulate a *correct* instruction and request that the trial court give it." *Baker*, 26 P.3d at 842. (emphasis added). Because the "correct in all respects" rule is a rule of appellate review, and not of trial procedure, defendant's argument that it was waived or voided by the trial court's line by line review is erroneous.

2. The "Correct in All Respects" Rule Is Not about Preservation of Error

Philip Morris erroneously treats the basis of the Oregon Supreme Court's ruling as the application of an error preservation rule, at one point calling it a "state default rule." Br. 20, 25. It even claims that three dissenters in *Williams II* "found merit in plaintiff's waiver argument." Br. 20. Yet, that dissent acknowledges that Philip Morris preserved its objection to denial of its request; it just didn't object

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Philip Morris's trial counsel stated that he would "work out with [Mrs. Williams' counsel] basically a modification of [respondent's]" proposed instruction. J.A. 26a. But, again, Philip Morris never proposed revised instructions on the harm issue.

to the charge actually given. *Williams II*, 127 S.Ct. at 1068 (Ginsburg, J., dissenting).

Based on this mistake, Philip Morris argues this case as if were about preservation of error. The Oregon Supreme Court, however, has held that failure to preserve error is different from absence of error where a trial court declines to give a requested instruction that is not correct in all respects:

> to preserve an error in failing to give a requested instruction, the aggrieved party need not make any further objection; . . . However, the failure to give a requested instruction *is not error* if the requested instruction was not correct in all respects.

Bennett v. Farmers' Ins. Co., 26 P.3d 785, 795 (Or. 2001) (emphasis added). *See also Leiseth v. Fred Meyer, Inc.*, 57 P.3d 914, 916 (Or. Ct. App. 2002) (citation omitted) ("Even if the claim of error is adequately preserved, failure to give a requested instruction is not error unless the instruction is correct in all respects."). The Oregon Supreme Court followed the same path in this case. Pet. App. 14a ("correct in all respects" rule is a "well-understood standard governing claims of error respecting a trial judge's refusal to give a proffered instruction").

It is no answer to the decision below to argue, as Philip Morris does, that it preserved an objection to the court's refusal to give its requested instruction. The trial court's failure to give an instruction *is not error* unless the instruction requested was clear and correct in all respects.

F. OREGON HAS SUBSTANTIAL AND LEGITIMATE INTERESTS IN APPLYING ITS RULES GOVERNING JURY INSTRUCTIONS

Philip Morris asserts that the "'correct in all respects' requirement serves no legitimate purpose." Br. 30. Petitioner only partially describes the rule's purpose when it says the rule merely ensures that "trial judges are fairly apprised of a party's request, and ... avoid[s] placing on the trial judge the burden of editing an incorrect" instruction. *Id.* Thus, Philip Morris repeats its error in treating the requirement as a rule of trial procedure that can be overcome by preservation of error. Yet, as demonstrated at pp. 38-40 *supra*, it is a rule of appellate review that treats denial of a partially incorrect instruction as the absence of error.

The requirement of "legitimate purpose" invoked by Philip Morris, even if applicable to civil actions,[20] is fully satisfied here. Although the Oregon courts have not had to justify the rule, the "correct in all respects" rule obviously furthers significant legitimate state interests. For example, it "serves the State's important interest in ensuring that counsel do their part in preventing courts from providing juries with erroneous instructions," an interest this Court deemed sufficient in *Osborne*, 495 U.S. at 123. Philip Morris ignores the fact that the Oregon Supreme Court noted this purpose in its decision below. Pet. App. 14a ("[t]he effect of that standard is to require that a party to litigation take

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[20] It has been suggested that the requirement is inapplicable to civil actions. *See* 16B Wright & Miller § 4028.

responsibility for the jury instructions"). It thus is an important element in avoiding flawed trials, an interest Oregon regards as constitutionally mandated. *Hoag v. Washington-Oregon Corp.*, 147 P. 756, 765 (Or. 1915) (holding that the Oregon Constitution commands "faultless" jury trials, which depend, in part, on "a jury correctly instructed as to the law."). It also minimizes costly retrials, as well as helps achieve finality in judgments. Cf. *Patrick ex rel. Estate of Patrick v. State*, 36 P.3d 976, 981 (Or. Ct. App. 2001) (recognizing appellate rules often reflect "strong policy favoring the finality and effectiveness of judgments").

Moreover, because the trial judge has no obligation to rewrite a party's faulty proposal, *see Brigham v. Southern Pac. Co.*, 390 P.2d 669, 671 (Or. 1964), and offering the incorrect instruction would be reversible error, the "correct in all respects" rule can only be regarded as a sound principle of judicial administration. As such, it facilitates the broad system-related goals of facilitating the administration of claims and promoting judicial efficiency. *Cf. John R. Sand & Gravel Co. v. United States,* 128 S.Ct. 750,753 (2008).

At the same time, the rule creates no inherent conflict with the remedial objectives of federal Due Process. It is not "outcome-determinative" in the sense discussed in *Felder v. Casey*, 487 U.S. 131, 141 (1988). Thus, as in *Johnson v. Fankell*, 520 U.S. 911, 918 (1997), the Oregon Supreme Court's ruling "rest[s] squarely on a neutral state Rule regarding the administration of the state courts."

II. OREGON LEGITIMATELY CONSIDERED STATE LAW ISSUES ON REMAND

A. THE QUESTION OF THE PROPRIETY OF PHILIP MORRIS'S JURY INSTRUCTION REQUEST UNDER STATE LAW WAS PART OF THE NEW CONSTITUTIONAL STANDARD ON THIS COURT'S REMAND

Philip Morris argues that the question whether its multifaceted jury instruction request was "correct in all respects" was not properly before the Oregon Supreme Court below because this Court's last grant of certiorari "implicitly rejected" plaintiff's argument that the instruction request was not correct in all respects. Br. 21. It also complains that, in applying the "correct in all respects" rule, the Oregon court therefore "re-examined" the premise of this Court's decision — that a proper request had been made. *Id.*

Petitioner's argument ignores the explicit terms of the constitutional standard this Court enunciated on remand to the Oregon court: "a court, *upon request*, must protect against" a significant risk of jury confusion over the proper use of harm to others in evaluating punitive damages "*in appropriate cases*." *Williams II*, 127 S.Ct. at 1065 (emphases added). Because the only request worthy of consideration is a proper one, the proper request requirement was part of the new[21] constitutional standard this Court instructed the Oregon Supreme

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[21] This Court recognized that it was enunciating a new constitutional standard. *Williams II*, 127 S.Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

Court to apply on remand. The Oregon court properly considered the question whether Philip Morris had made a proper request under Oregon law:

> [W]e understand the Court's use of the phrase, "upon request," . . . to be an acknowledgment of the authority of states to place reasonable procedural requirements on any request for instructions, including requests like the one at issue here. Our treatment of this topic in the pages that follow is based on that understanding, and on the belief that Oregon's rule concerning the correctness of requested instructions is a reasonable allocation of responsibility to parties to a jury trial.

Pet. App. 13a n.4 (citation omitted). The Oregon Supreme Court followed the terms of this Court's remand when it reviewed whether Philip Morris's Request No. 34 was a proper request under Oregon law. Far from "implicitly rejecting" Mrs. Williams' argument, this Court had made it part of the question on remand. The Oregon Supreme Court properly ruled on the question.

Philip Morris cites several cases for the proposition that this Court's grant of certiorari establishes that state law was satisfied and thus constitutes as "law of the case." Br. 15-17, 21-25. Yet, in none of those cases, did this Court create an "upon request" standard. This Court's decision in *Williams II* thus differs from the standard announced in *State Farm*, where this Court found that an instruction on extraterritoriality was mandatory and not dependant

upon a request. *See State Farm*, 538 U.S. at 422 ("A jury *must* be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.") (emphasis added). Because a *Williams* instruction is triggered only by a "request," this Court clearly anticipated that States would rely upon the party-presentation principle in discharging this duty. The Oregon Supreme Court held that Philip Morris failed to meet that responsibility.

No case Philip Morris cites to argue otherwise is factually or procedurally on point. In *Stanton v. Stanton*, 429 U.S. 501, 503 (1977), the Utah Supreme Court rejected the federal Equal Protection claim upheld by this Court as "blind to the biological facts of life." In *United States v. Williams*, 504 U.S. 36 (1992), the only issue was whether Congress or the Constitution had authorized a federal circuit court to develop the rule it imposed. Here, there can be little doubt that the Oregon Supreme Court has the "premier hand" in matters of state judicial administration. *Oregon ex rel. Johnson v. Dale*, 560 P.2d 650, 654 (Or. 1977).

Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969) is also inapposite. There, no law of the case was established. Instead, this Court faulted the Virginia court for inconsistently following a rule that this Court found was "more properly deemed discretionary than jurisdictional." *Id.* at 234.

NAACP v. Alabama ex rel. Patterson, 360 U.S. 250 (1959)(per curiam), is wholly inapplicable as it holds only that a litigant cannot invoke and a state court cannot rely on arguments *presented for the first*

time after remand and based on inconsistently followed procedural obstacles. 360 U.S. at 242-43; *NAACP v. Alabama,* 357 U.S. 449, 457-58 (1958). Mrs. Williams' repeatedly reiterated objections and the uniformity with which Oregon has followed its "correct" rule distinguish this case from that controversy.

Unlike this case, *Smith v. Texas,* 127 S.Ct. 1686, 1690 (2007), involved a state court that predicated its procedural bar "on a misunderstanding of the federal right" at issue. In addition, the litigant opposing relief was attempting to assert "a procedural bar different from and indeed contradictory to the one it now raises." *Id.* at 1694. Here, Mrs. Williams consistently asserted the grounds upon which the Oregon Supreme Court determined that there was no error in refusing Philip Morris's requested instruction.

B. THE SEQUENCE OF CONSIDERATION IS NOT FEDERALLY MANDATED

Philip Morris argues that, because Oregon often applies a "first things first" doctrine under which state law questions are ordinarily decided before federal constitutional questions, it was somehow "implicit" in the Oregon Supreme Court's prior decision[22] on the federal issue that there was no procedural defect in Philip Morris's jury instruction request. Br. 14, 40-42. There is no Oregon authority for such a contention.

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[22] Philip Morris refers to "prior decisions" (Br. 14) while, of course, the Oregon Supreme Court had made only one prior decision on the merits in this case.

The Oregon practice of considering state law issues before reaching federal issues is based on the practical logic that, if state law grants a party complete relief, the state cannot have violated that party's federal rights, and federal law need not be considered. *See Sterling v. Cupp*, 625 P.2d 123, 126 (Or. 1981) (Linde, J.). That prudential state practice does not confer on a party any right to avoid the consideration of state law whenever a court has previously relied on federal law for its decision. Here, Philip Morris, on remand, made the federal issues its first assignment of error. App. 7a-10a. Thus, it asked the Oregon courts to take up federal issues first. While Philip Morris suggests that the "first things first" approach confers a right that overtakes state law, it cites no authority for that novel proposition.

Yet, as Justice Alito has pointed out, "in cases in which this Court has reversed a state-court decision based on a possible federal constitutional violation, it is not uncommon for the state court on remand to reinstate the same judgment on state-law grounds." *Smith*, 127 S.Ct. at 1703 (Alito, J., dissenting) (collecting cases). In a similar vein, this Court has recognized the "settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). As Justice Marshall observed, "to suggest that the Oregon Supreme Court is foreclosed from considering the respondent's state-law claims ...[would be an] unprecedented assumption of authority ... as much a surprise to the Supreme Court of Oregon as it is to me." *Oregon v.*

Hass, 420 U.S. 714, 729 (1975) (Marshall, J., dissenting).

The Oregon Supreme Court's consideration of state-law issues on remand is in no sense a "re-examination" of the underpinnings of *Williams II*. The court, as did this Court in *Williams II*, recognized that Philip Morris had preserved its due-process argument for appellate review in the context of the failure to give its proposed instruction No. 34. *See Williams II*, 127 S. Ct. at 1069 (Ginsburg, J., dissenting) (noting that Philip Morris preserved no other objection). That allowed Philip Morris to press its view of federal due process on appeal. Its successful preservation of that objection, however, could not foreclose consideration of a remaining state-law issue, specifically, whether it was error for the trial court to refuse a requested instruction that was not clear and correct in all respects.

Nothing in federal law requires a state court to dispose of state issues first. *Oregon v. Kennedy*, 456 U.S. 667 (1982) is instructive. As this Court explained, the Oregon Court of Appeals decided a case based on the federal Double Jeopardy Clause. *Id.* at 671. This Court reversed, finding treatment of the federal issue erroneous and remanding for proceedings not inconsistent with its opinion. *Id.* at 679. On remand, Oregon's Supreme Court agreed with the prudential idea that state courts should ordinarily decide dispositive state-law issues first, but nonetheless addressed the state-law issue. *Oregon v. Kennedy*, 666 P.2d 1316 (Or. 1983). Given that the court had declined review without explanation during the case's first journey through the appellate system, the court said that failing to

address the state-law issues on remand would burden the court's system of discretionary review and place the successful party in an unreasonable position:

> the successful party who might prefer a decision on state grounds has no reason to petition us for review. Surely a practice that requires a winning party to seek review solely in order to shift a favorable judgment from federal to state grounds is wholly unreasonable, apart from its logical flaws.

Id. at 1319 (footnote omitted).

Philip Morris asks this Court to change Oregon law to make a prudential practice a mandatory federal rule imposed on the state courts as if this Court exercised supervisory authority over state judicial administration. Yet, however advisable it may be for "state courts to apply state law before reaching federal constitutional questions, [this Court has] never held that States are required to follow this sequence." *Smith*, 127 S.Ct. at 1703 (Alito, J., dissenting).

C. THE CASE'S PROCEDURAL CONTEXT EXPLAINS WHY STATE LAW ISSUES WERE CONSIDERED AFTER REMAND

The procedural history of this case suggests that this court's remand order in *Williams I* may have inadvertently truncated the Oregon courts' consideration of state-law issues. *Cf. Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991) (recognizing that the Minnesota Supreme Court's incorrect First

Amendment ruling "may well have truncated its consideration of" alternate state-law grounds).

Although the trial court rejected proposed instruction No. 34 on state-law grounds, which the Oregon Court of Appeals sustained, Pet. App. 140a, and the Oregon Supreme Court originally declined review, this Court accepted jurisdiction over the case and remanded it in light of *State Farm*. In response, on remand, the Oregon Court of Appeals and Oregon Supreme Court, first addressed only the federal due-process excessiveness and instructional issues. That approach is entirely consistent with the view that state courts may choose, in some circumstances, to address the merits of a federal issue first:

> [a state] court may believe that the merits question is easier, and the court may think that the parties and the public are more likely to be satisfied that justice has been done if the decision is based on the merits instead of what may be viewed as a legal technicality.

Smith, 127 S.Ct. at 1703 (Alito, J., dissenting).

Once this Court issued its *Williams II* ruling on the federal instructional issue, the Oregon Supreme Court, on remand, recognized that it was obligated to consider the state-law basis for whether a proper request was made. Pet. App. 13a. The Court explained that it had previously failed to address that question, repeatedly urged by Mrs. Williams, because it believed it had correctly resolved the federal issue in her favor, leaving "no need to address those alternative reasons for affirmance." *Id.*

at 9a n.2. Because the Oregon court reasonably believed it had correctly resolved the federal issue in 2006, its earlier ruling should not, and traditionally does not, preclude it from reaching other issues that, on remand in 2007, were no longer superfluous.

D. FAILING TO CONSIDER PLAINTIFF'S STATE LAW OBJECTIONS WOULD HAVE VIOLATED PLAINTIFFS' FEDERAL DUE PROCESS RIGHTS

Mrs. Williams, no less than Philip Morris, has a due process right at stake in this case. Due Process protects all "civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982). As this Court stated in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971), "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Just as Philip Morris must have "an opportunity to present every available defense." *Williams II*, 127 S.Ct. at 1063 (quotation omitted), Mrs. Williams must have the same opportunity.

Here, she assiduously raised and preserved state law objections to Philip Morris's proposed jury instruction on grounds that the Oregon Supreme Court reached only after learning that it had misapplied federal law. Mrs. Williams should not be denied the protections of state law, equally available to all parties, when, as Philip Morris itself concedes, she has argued repeatedly that the proposed

instruction was erroneous under state law. Br. 25 n.7. Indeed, it would be fundamentally unfair to permit Philip Morris to assign error to the trial court's failure to give instruction No. 34, so that it may preserve its federal due process argument for appellate review, and, at the same time, deny Mrs. Williams an opportunity to contest the propriety of the instruction as a whole, when, as the prevailing party, she could not have appealed on that basis. Instead, as both federal and Oregon law recognize, Mrs. Williams was "free to defend [the] judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered." *Washington v. Yakima Indian Nation,* 439 U.S. 463, 478 n.20 (1979); *see also Outdoor Media Dimensions, Inc. v. Oregon,* 20 P.3d 180, 195-96 (Or. 2001).

Philip Morris's contention amounts to a novel theory of judicial waiver of a party's rights, applicable even when the party itself has done everything required of it to retain those rights. Due Process, properly understood, would not support such a theory. The Oregon Supreme Court was in fact obligated, on remand, to take up Mrs. Williams' state-law objections to the proposed instruction. Had it not done so, Mrs. Williams' due-process rights would have been violated.

III. PHILIP MORRIS'S BID FOR A NEW TRIAL IS IMPROPER

It is time for this litigation marathon to end. Jesse Williams' widow has courageously fought against great odds to bring this case to trial and prevailed nine years ago in an intensely contested,

well-managed five-week jury trial. The Oregon courts have reviewed this case, examining the record punitive damages award scrupulously, as this Court mandated in *Cooper Industries*, not just once but four times. With this trip to this Court, the case makes its third appearance over a period of five years.

There is no justification for this court to consider the "remedy" Philip Morris seeks of a new jury trial. At this late stage, after all the full briefings, exhaustive hearings, and multiple decisions, sending an individual without the resources and experience of its opponent back to square one again would epitomize the idea that justice delayed is justice denied.

Philip Morris bases its bid for a wholly new trial on the claim that it is unclear how the jury arrived at its $79.5 million verdict, (Br. 43), despite the fact that verdict has met repeated appellate approval. Yet, a retrial, at least a decade after the original trial in this case, cannot comport with the type of fundamental fairness that the Due Process Clause guarantees. The "'fundamental requirement of due process'" is "'the opportunity to be heard' *at a meaningful time* and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (citation omitted) (emphasis added).

A retrial today could not meaningfully present the issues. At the time of trial in 1999, Philip Morris vigorously denied that smoking caused cancer and had a long and unbroken history of asserting this denial publicly. Today, that is no longer true.

Besides the incredible expense that a retrial would incur for the Plaintiff, having the burden of

proof and relying on expensive expert evidence, Mrs. Williams, who is in poor health, would have to undertake the ordeal of testifying about matters now deeply in the past. The same justifications that exist for statutes of limitations apply with full force here. It is too late to retry a claim after "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency,* 321 U.S. 342, 342, 348-49 (1944).

In addition, a re-trial would permit Philip Morris to correct tactics and strategies it employed in the first trial that may have backfired on it. For example, the company called a professor of Southeast Asian history as an expert on what media statements Jesse Williams might have read that would have led him to believe Philip Morris was trying to convince him that cigarettes were safe. Besides the obvious questions about the expert's qualifications, the expert unwittingly exposed a file to plaintiff's counsel that was marked so it wouldn't be used at trial. He then suffered a devastating cross-examination that surely had an impact with the jury. Trial Tr. Vol. 15-B at 83-95, Plaintiffs Ex. 175, Oral Argument in the Circuit Court of the State of Oregon, County of Multnomah, March 12, 1999)

Simply put, nothing has changed from this case's last appearance in this Court that would justify a "re-do."

CONCLUSION

This Court should dismiss the action for lack of jurisdiction or, alternatively, affirm the judgment below.

Respectfully submitted,

October 2, 2008

ROBERT S. PECK*
ANDRE M. MURA
CENTER FOR CONSTITUTIONAL LITIGATION, P.C
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2803
robert.peck@cclfirm.com

JAMES S. COON
RAYMOND F. THOMAS
SWANSON THOMAS & COON
820 SW Second Avenue
Suite 200
Portland, OR 97204
(503) 228-5222

WILLIAM A. GAYLORD
GAYLORD EYERMAN BRADLEY P.C.
1400 SW Montgomery St.
Portland, OR 97201
(503) 222-3526

CHARLES S. TAUMAN
CHARLES S. TAUMAN, P.C.
P.O. Box 19631
Portland, OR 97280
(503) 849-9821

MAUREEN LEONARD
ATTORNEY AT LAW
520 SW Sixth Avenue, Suite 920
Portland, OR 97204
(503) 224-0212

KATHRYN H. CLARKE
ATTORNEY AT LAW
P.O. Box 11960
Portland, Oregon 97211
(503) 460-2870

Counsel for Respondent Mayola Williams

* Counsel of Record

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APPENDIX A

Excerpts from the Transcript of Proceedings in the United States Supreme Court (October 31, 2006)

* * *

JUSTICE SOUTER: The difficulty that I have is because I think the instruction that was proposed on behalf of your client was not a clear instruction, I have great difficulty in seeing how I could find that it was error to refuse to give the instruction.

* * *

JUSTICE SOUTER: So my problem is, if I think they really did have the wrong view of the law but the issue was focused at the trial court by a request for an instruction which I think was properly denied, what do I do? Do I concentrate on what they said in the opinion or do I concentrate on what I think was the deficiency of the instruction?

MR. FREY: Well, I think what you do is decide the Federal issue, which I think is whether they were correct in the legal proposition that they asserted.

JUSTICE SOUTER: But then they would respond, when they made that, when they gave that explanation in the Oregon Supreme Court, they were responding to a claim of error which was focused and raised at the trial level by the request for an instruction, which strikes me as probably an unsound instruction, an unsound request.

JUSTICE SCALIA: Well, I guess we could leave it up to them whether they want to disallow the instruction for a different reason, but the fact is they disallowed it for the reason that you say.

MR. FREY: That's correct.

* * *

MR. FREY: But we anticipated the problem. We proposed an instruction which would as best we could at the time address the problem. Maybe it could be edited up to be a little sharper. But I think it contains the essential point that we're driving at here today.

APPENDIX B

Excerpts from the Transcript of Proceedings in the Oregon Supreme Court (May 10, 2005)

Before Justice DeMuniz
Justice Gillette
Justice Durham

* * *

JUSTICE DURHAM: Mr. Gary, I wanted to ask you a question. Is it your position that the remand for reconsideration in light of *State Farm* alters or relieves any preservation requirements that Oregon law might apply?

MR. GARY: No, it does not relieve. No, it does not. The same preservation rules require an issue that is not adequately preserved can be rejected by this court and that would be an adequate state ground. In this case the instructional error I'm talking about was adequately preserved.

* * *

APPENDIX C

Excerpts from the Transcript of Proceedings in the Oregon Supreme Court (September 11, 2007)

Before Justice DeMuniz
Justice Gillette
Justice Durham

* * *

JUSTICE DURHAM: One more bit of brush clearing. We are just talking about the adequacy of the offered instruction from your client. We're not talking about . . . charges that Oregon's procedures for the drafting and submission of jury instructions and the approval of jury instructions by the trial court . . . is somehow invalid are we. There's no problem with that is there.

MR. GARY: No.

JUSTICE DURHAM: Stated another way. Your client had a full opportunity to submit whatever instructions it wished and to get a legally correct instruction delivered by the trial court correct?

MR. GARY: Yes, and it took advantage of its procedural right by requesting that Defendant's instruction 34, sub 1, which was the paragraph that was set out in this court's prior opinion. Now, we believe that the Supreme Court decision in this case makes it very clear that the instruction that was requested was a correct statement of law. It addressed every one of the reasons that this court and the court of appeals had given previously for

saying that the instruction was not a correct statement of the law.

* * *

JUSTICE DURHAM: So you're saying that the Barbo principal of correct in all respects is not the law?

MR. GARY: I don't believe, I believe that that is the law qualified by not only George but the cases that came before it that talk about the reason for the preservation rule. The reason for the preservation rule is to make sure that the parties are not blindsided and the trial court is not blindsided. When the trial court says I don't want to give an instruction on the subject on harm to others, there isn't a requirement that the Plaintiff or the Defendant, whoever is requesting the instruction, refine the instruction and engage in the futile act of trying to persuade the trial court that it should change its mind.

* * *

JUSTICE DURHAM: Under that theory, would it not be your view that the trial court would have to act spontaneously, would it not, to draft an instruction on its own to meet that duty. That it could ignore the responsibility of the parties to submit accurate instructions beforehand?

MR. GARY: No. I don't think that's true, your Honor. There probably are other ways that one a party or defendant could raise the need for protection. I would assume that when it is raised, the trial court if it agreed that there was a

significant risk that the jury would be confused would ask, what do you want me to do?

JUSTICE DURHAM: Must you be correct today that your instruction was accurate in all respects in order to prevail on the state law question of the correctness of the trial court's rejection of your proposed instruction?

MR. GARY: No, because of the rule of *State v. George*.

* * *

APPENDIX D

Excerpts from Defendant-Respondent Philip Morris USA Inc.'s Brief on Remand from the United States Supreme Court (December 30, 2003)

IN THE COURT OF APPEALS FOR
THE STATE OF OREGON

Multnomah County Circuit Court
Case No. 9705-03957

Court of Appeals
A106791

MAYOLA WILLIAMS, Personal Representative of the Estate of JESSE D. WILLIAMS, Deceased,

Plaintiff-Appellant,
Cross-Respondent,

v.

PHILIP MORRIS INCORPORATED, nka PHILIP MORRIS USA INC.,

Defendant-Respondent,
Cross-Appellant,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., and PHILIP MORRIS COMPANIES, INC.,

Defendants.

DEFENDANT-RESPONDENT PHILIP MORRIS USA INC.'S BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT

Appeal From Judgment of May 25, 1999, and Order of June 22, 1999
Multnomah County Circuit Court
Honorable Anna J. Brown

William F. Gary, OSB #77032
Sharon A. Rudnick, OSB #83083
James E. Mountain, Jr., OSB #75267
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3248
Telephone: (541) 485-0220

Murray R. Garnick
Arnold & Porter
555 Twelfth Street N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000

Attorneys for Defendant-Respondent, Cross-Appellant
(Attorneys continued on reverse)

December 2003

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IN THE SUPREME COURT OF THE
STATE OF OREGON
Multnomah County Circuit Court
Case No. 9705-03957
CA A106791
SC S51805

MAYOLA WILLIAMS, Personal Representative of the Estate of JESSE D. WILLIAMS, Deceased,

Plaintiff
Respondent on Review,

v.

PHILIP MORRIS INCORPORATED, nka PHILIP MORRIS USA INC.,

Defendant
Petitioner on Review,

and

RJ REYNOLDS TOBACCO COMPANY, FRED MEYER, INC., and PHILIP MORRIS COMPANIES, INC.,

Defendants.

PETITIONER ON REVIEW PHILIP MORRIS USA INC.'S OPENING BRIEF ON THE MERITS

Review of the decision of the Court of Appeals on remand by the United States Supreme Court, following defendant's appeal from a judgment of the Circuit Court for Multnomah County, Honorable Anna J. Brown

Opinion Filed: June 9, 2004
Author of Opinion: Edmonds, Presiding Judge
Before: Edmonds, Presiding Judge
Armstrong, Judge
Wolheim, Judge

Reversed in Part and Remanded

Filed: February 1, 2005

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The Court of Appeals also noted, in a footnote, that the trial court did not commit instructional error because PMUSA's proposed instruction was "confusing." Williams III, 193 Or App at 557 n6. The court found the instruction "confusing" because it "informed the jury both that it may consider the harm to others in determining the reasonable relationship of its award to the harm caused to Williams and that it may not punish defendant for the impact of its misconduct on others." Id. As discussed below, the court erred in affirming the verdict on this alternative basis because, among other things, PMUSA's proposed instruction was not confusing, but instead consistent with State Farm.

As an initial matter, the Court of Appeals' decision ignores that PMUSA did not simply propose the requested instruction; it also affirmatively objected to the instruction that was actually given. See Bennett v. Farmers Ins. Co., 332 Or 138, 154,26 P3d 785 (2001) (where a party claims an "error in the jury instructions given, the fact that the requested instruction was not correct in all respects is not determinative"). All that PMUSA was required to do was to "have pointed out that error or omission to the trial court" and to except "immediately after the court instructed the jury." Id. That is exactly what PMUSA did here. See supra Section Y.B.1. Because PMUSA properly objected to the jury instructions given, it is entitled to a new trial irrespective of whether its own proposed instructions contained errors and omissions. See, e.g., State v. George, 337 Or 329,97 P3d 656, 660 (2004) (even if requested instruction incorrect, trial court nonetheless required

to instruct jury, and failure to do so resulted in reversible error).

APPENDIX F

Excerpts from Defendant – Appellant Philip Morris USA Inc.'s Excerpt of Record and Appendix in the Court of Appeals for the State of Oregon, in the Estate of Michelle Schwarz, deceased, by and through her Personal Representative, Richard Schwarz, v. Philip Morris Incorporated, nka Philip Morris USA Inc., et al., (June 2003)

In the Court of Appeals for the State of Oregon
Multnomah County Circuit Court
Case No. 0002-01376
Court of Appeals
CA A118589

THE ESTATE OF MICELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,
Plaintiff-Respondent,
Cross-Appellant,
v.
PHll1P MORRIS INCORPORATED, nka PHILIP MORRIS USA INC., a foreign corporation,
Defendant-Appellant,
Cross-Respondent,
and
ROTHS IG.A. FOODLINER, INCORPORATED, an Oregon corporation,
Defendant

DEFENDANT – APPELLANT PHILIP MORRIS USA INC.'S EXCERPT OF RECORD AND APPENDIX

Appeal From Judgment of May 12, 2002
Multnomah County Circuit Court
Honorable Roosevelt Robinson

William F. Gary, OSB #77032
Sharon A. Rudnick, OSB #83083
James E. Mountain, Jr., OSB #75267
Susan D. Marmaduke, OSB #84145
Harrang Long Gary Rudnick P.C.
360 East 10th Avenue, Suite 300
Eugene, OR 97401-3248
Telephone: (541) 485-0220
Facsimile: (541) 686-6564

Murray R. Gamick
Amy K. Phillips
Arnold & Porter
555 Twelfth Street N.W.
Washington, D.C. 20004
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Attorneys for Defendant-Appellant, Cross Respondent

June 2003

(Attorneys continued on reverse)

IN THE STATE COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH
Case No. 0002-01376

THE ESTATE OF MICELLE SCHWARZ, deceased, by and through her Personal Representative, RICHARD SCHWARZ,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, a foreign corporation, and ROTHS I.G.A. FOODLINER, INCORPORATED, an Oregon corporation,
Defendants.

DEFENDANT'S REQUESTED JURY INSTRUCTIONS (AMENDED)

Defendant requests that the Court give the following jury instructions, applicable under Oregon law.

DATED this 12th day of March, 2002.

LINDSAY, HART, NEIL & WEIGLER, LLP

By: James L. Dumas, OSB No. 77167
Jay W. Beattie, OSB No. 87163
Michael G. Harting, OSB No. 87239
Of Attorneys for Defendant
Philip Morris Incorporated

TRIAL ATTORNEY: James L. Dumas

DEFENDANTS REQUESTED INSTRUCTION
NO. 41

NO PUNISHMENT FOR HARMS SUFFERED BY ANYONE OTHER THAN THIS PLAINTIFF

You are not to impose punishment for harms suffered by persons other than the plaintiff before you.

Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001); *BMW of N. America v. Gore*, 517 U.S. 559, 581 (1996).

DEFENDANT'S REQUESTED INSTRUCTION
NO. 42
(AMENDED)

NO PUNISHMENT FOR OUT-OF-STATE CONDUCT
(ALTERNATIVE TO INSTRUCTION NO. 41)

You are not to punish a defendant for the impact of its conduct on individuals in other states.

BMW of N. America v. Gore, 517 U.S. 559, 567-75 (1996); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F3d 634, 636 (10th Cir. 1996)

DEFENDANT'S REQUESTED INSTRUCTION
NO. 47

REASONABLE RELATIONSHIP

The size of any punishment must bear a reasonable relation or proportion to the harm suffered by the plaintiff because of the defendant's punishable misconduct - that is, to the nature and extent of the wrong done to the plaintiff. You are not to consider harms, if any, suffered by the plaintiff that were caused by conduct or events other than the conduct that you have found to merit punishment.

BMW of North America, Inc. v. Gore, 517 US 559, 580-82 (1996); Jensen v. Medley, 170 OrApp 42, 57-58, 11 P3d 678 (2000).

APPENDIX G

Oregon Cases Applying Clear and Correct in all Respects Doctrine

Bennett v. Farmers Ins. Co., 26 P.3d 785, 795 (Or. 2001) ("failure to give a *requested* instruction is not error if the requested instruction is not correct in all respects").

Oregon v. Reyes-Camarena, 7 P.3d 522, 528 (Or. 2000) (no error in declining instruction that "did not state the law correctly in all respects . . . regardless of whether that instruction was correct in part").

Coulter Prop'ty Mgmt v. James, 970 P.2d 209, 215 (Or. 1998) (no error if requested instruction is not correct in all respects).

Hernandez v. Barbo Mach. Co., 957 P.2d 147, 151 (Or. 1998).

Simpson v. Sisters of Charity of Providence, 588 P.2d 4, 13 (Or. 1978) (requested instruction that "contained objectionable language" properly rejected).

Beglau v. Albertus, 536 P.2d 1251, 1256 (Or. 1975).

Owings v. Rose, 497 P.2d 1183, 1188 (Or. 1972) ("trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors.").

Dacus v. Miller, 479 P.2d 229, 232 (Or. 1971) ("trial court will be upheld in refusing to give a technically incorrect instruction even though, after mature consideration, an appellate court might

conclude that the giving of the instruction would not have constituted reversible error").

McCaffrey v. Glendale Acres, 440 P.2d 219, 222-223 (Or. 1968).

Oregon v. North, 390 P.2d 637, 639 (Or.), *cert. denied*, 379 U.S. 939 (1964).

Stanich v. Buckley, 368 P.2d 618, 621 (Or. 1962).

Wiebe v. Seely, 335 P.2d 379, 393 (Or. 1959) ("[I]t is well settled that if a requested instruction is not altogether free from fault, the court need not give it.").

Schultz v. Shirley, 220 P.2d 86, 88 (Or. 1950).

Mason v. Allen, 195 P.2d 717, 722 (Or. 1948).

Hotelling v. Walther, 148 P.2d 933, 935-936 (Or. 1944).

Morris v. Fitzwater, 210 P.2d 104, 108 (Or. 1941).

State v. Quartier, 247 P. 783, 783-784 (Or. 1926) ("requested instruction is always properly refused, unless it ought to have been given in the very terms in which it was proposed.").

Hooning v. Henry, 213 P. 139, 141 (Or. 1923).

Sorenson v. Kribs, 161 P. 405, 411 (Or. 1916).

Staten v. Steel, 191 P.3d 778 (Or. Ct. App. 2008).

Moe v. Eugene Zurbrugg Constr. Co., 123 P.3d 338, 345 (Or. Ct. App. 2005) (no error to decline instruction if it "is not correct in all respects").

Roop v. Parker Northwest Paving Co., 94 P.3d 885, 903-04 (Or. Ct. App. 2004).

Leiseth v. Fred Meyer, 57 P.3d 914, 916 (Or. Ct. App. 2002) ("failure to give a requested instruction is not error unless the instruction is correct in all resepects") (citation omitted).

Baker v. Infratech Corp., 26 P.3d 835 (Or. Ct. App. 2001).

Summers v. Binns, 10 P.3d 294, 297 (Or. Ct. App. 2000).

Burke v. American Networks, Inc., 768 P.2d 924 (Or. Ct. App. 1989).

REPLY BRIEF

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Supreme Court, U.S.
FILED
NOV 3 - 2008
OFFICE OF THE CLERK

No. 07-1216

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to The Supreme Court of Oregon

REPLY BRIEF FOR THE PETITIONER

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
SCOTT A. CHESIN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
(Additional counsel listed on inside cover)

73064

34

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

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REPLY BRIEF FOR THE PETITIONER

Despite her strenuous efforts, plaintiff cannot explain away the Oregon Supreme Court's blatant refusal to follow this Court's instructions. This Court held in *Williams II* that "a jury may not punish for the harm caused others," reversed the judgment resting on that error, and remanded the case for application of the proper constitutional standard. 127 S. Ct. at 1065.

Instead of following this Court's clear directions, the Oregon Supreme Court reinstated its judgment without ever applying the constitutional standard. It declared for the first time, after nine years of appellate litigation, that Philip Morris's proposed instruction on harm to non-parties "was flawed for reasons that we did not identify in our former opinion"—"reasons unrelated to the issues addressed by the United States Supreme Court." Pet. App. 3a, 15a.

It is simply double-talk to contend that "apply the standard" means "find an excuse not to apply the standard." And it is wholly disingenuous to contend that the "correct in all respects" rule is a firmly established and regularly followed state ground when it never has been applied by any Oregon court in circumstances remotely like those presented here. As applied in this case, the rule advances no legitimate purpose but simply insulates constitutional error from meaningful appellate review, a result at odds with the supremacy of federal law.

Finally, plaintiff has little to say about the issue that the Oregon Supreme Court *should have* addressed on remand from *Williams II*: the appropriate remedy for the trial court's constitutional error. We submit that the only proper remedy is a new trial

and that this Court should grant that remedy itself in order to avoid further error and delay.

I. THE OREGON SUPREME COURT FAILED TO COMPLY WITH THIS COURT'S CLEAR DIRECTIONS.

A. The Oregon Supreme Court Did Not Purport To Apply The Constitutional Standard.

1. This Court's remand instructions were unambiguous: "to apply the [constitutional] standard we have set forth." 127 S. Ct. at 1065. In her merits brief, plaintiff reprises the principal argument that she made in her opposition to certiorari—that the Oregon Supreme Court did in fact apply the constitutional standard, because its opinion rested on a finding that Philip Morris failed to make a proper "request" for protection of its rights. Br. 45.

But as we explained in our opening brief (at 17-18), that argument cannot be squared with the express language of the Oregon Supreme Court's opinion: "there is a preliminary, independent *state law standard* that we must consider, *before we address the constitutional standard* that the United States Supreme Court has articulated." Pet. App. 13a (emphasis added). After finding that Philip Morris's proposed instruction was "erroneous in a number of ways that are *unrelated* to the issues addressed by the United States Supreme Court," *id.* at 15a, the Oregon court simply reaffirmed the judgment "*without reaching* the federal question." *Id.* at 13a (emphasis added).

In the face of this inescapably clear language, plaintiff relies on footnote 4 of the Oregon court's opinion. That footnote stated that "we understand

the Court's use of the phrase 'upon request' to be an acknowledgment of the authority of states to place reasonable procedural requirements on any requests for instructions, including requests like the one at issue here." Pet. App. 13a (citation omitted). Considered in the context of this Court's opinion, however, the "upon request" language cannot bear the weight that plaintiff seeks to place on it.

The Court's instruction was to "apply the standard we have set forth." That "standard" is the *substantive* constitutional standard—the prohibition on punishment for harms to non-parties, which the Oregon Supreme Court explicitly declined to apply. This Court's use of the phrase "upon request" earlier in the opinion was not an invitation to find a way to *avoid* applying that constitutional standard on remand. The Court was well aware of plaintiff's state-law waiver arguments, but nowhere did it ask the Oregon Supreme Court to revisit those arguments.

Indeed, the Court twice approvingly quoted Philip Morris's requested instruction on harms to non-parties. 127 S. Ct. at 1061, 1064. The Court further noted that Philip Morris requested that instruction "in light of" plaintiff's counsel's exhortation that the jury "'think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been.'" *Id.* at 1061. And the Court observed that Philip Morris had argued at the charge conference that its proposed instruction was constitutionally required. *Id.* at 1064. When the Court used the phrase "upon request," it was therefore describing what Philip Morris had done and explaining that litigants in future cases must also request protection of their constitutional rights, rather than

wait to raise the issue after the conclusion of the trial.

2. Our opening brief cited a host of cases in which this Court has corrected the failure of lower courts to follow its mandates. PM Br. 14-17. Plaintiff has little to say about these decisions. She does not even mention *Yates* v. *Aiken*, 484 U.S. 211 (1988), a closely analogous case where the lower court relied on state-law theories in order to avoid this Court's direction to apply a federal constitutional standard. This Court unanimously reversed.

Plaintiff attempts, in scattershot and unpersuasive fashion, to distinguish our other cases on their facts. For example, she asserts that *Stanton* v. *Stanton*, 429 U.S. 501 (1977), is not "on point" because the Utah Supreme Court there openly disagreed with this Court's equal-protection analysis as being "'blind to the biological facts of life.'" Br. 46 (quoting 429 U.S. at 503). And she contends that *Smith* v. *Texas*, 127 S. Ct. 1686 (2007), is irrelevant because the state court there "predicated its procedural bar 'on a misunderstanding of the federal right' at issue." Br. 47. Both of these rationales are unavailing: it does not matter whether the lower court's failure to follow the mandate constitutes overt defiance or simple misunderstanding—neither is permissible. See *Utah Public Serv. Comm'n* v. *El Paso Nat. Gas Co.*, 395 U.S. 464 (1969).[1]

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[1] The State of Oregon, in its amicus submission, claims that *Yates* and *Stanton* do not apply because on remand in those cases, "the state courts reached decisions that were at *odds* with this Court's earlier decision, and that were not simply based on an *alternative ground*." Or. Br. 6 (emphasis added). That is not correct; both state courts in those cases, like the

B. The Oregon Supreme Court Was Not Authorized To Re-Examine The Premise Underlying This Court's Decision.

Our opening brief explained that this Court's ruling in *Williams II* rested on the premise that Philip Morris's constitutional claim was properly presented. PM Br. 19-25. Indeed, in *Williams II*, plaintiff put forward an array of waiver arguments in her briefs in opposition to certiorari and on the merits—including the argument that Philip Morris's instruction was not "correct in all respects." See n.5 *infra*. This Court nevertheless reached the merits of Philip Morris's federal claim, as had the Oregon Supreme Court, and remanded for application of the correct substantive constitutional standard. The determination that Philip Morris's claim was properly presented thus became law of the case, which encompasses "everything decided by necessary implication." *Fogel* v. *Chestnutt*, 668 F.2d 100, 108-109 (2d Cir. 1981) (Friendly, J.). The Oregon Supreme Court was not free on remand to reach a contrary conclusion.

Relying on two dissenting opinions, plaintiff asserts that it is "'not uncommon'" for a state court on remand to reinstate a judgment that this Court has found to be constitutionally flawed. Br. 48 (citing *Smith* v. *Texas*, 127 S. Ct. at 1703 (Alito, J., dissent-

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Oregon court here, purported to base their post-remand decisions on "alternative" grounds. In *Yates*, the state court refused to consider, as it was instructed to do, whether a federal decision applied retroactively to the defendant's claim; instead, it held that no relief was available under state law. Similarly, in *Stanton*, the state court on remand attempted to skirt this Court's mandate by re-framing the federal issue altogether. In both cases, however, this Court held that a state court may not evade a mandate by changing the subject in this fashion.

ing), and *Oregon* v. *Hass*, 420 U.S. 714, 729 (1975) (Marshall, J., dissenting)).[2] She further argues that "[n]othing in federal law requires a state court to dispose of state issues first." Br. 49. These arguments are not responsive. We do not suggest that a state court may *never* identify on remand a state-law basis for a judgment that this Court has vacated. Rather, our argument is narrower: in a case like this one—where the parties have litigated the preservation of a constitutional claim in their briefs before this Court, and the Court proceeds to address the claim on the merits and directs the lower court to "apply" the constitutional rule it has announced—law of the case precludes the state court from invoking waiver in order to avoid following the Court's instructions. See PM Br. 22-24; *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240, 244 (1959) (per curiam) (the state court

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[2] The majority in *Smith* held that the state court could *not* adopt a new procedural default rule on remand to nullify a right that had been upheld by this Court. 127 S. Ct. at 1698-99. It is worth noting, moreover, that the cases cited in the *Smith* dissent do not support the Oregon Supreme Court's decision here. Each was a remand following a GVR order; none involved any substantive decision by this Court. None involved any direction to "apply" a substantive constitutional rule. And none involved a state procedural bar invoked for the first time on remand. See *State* v. *Wedgeworth*, 127 P. 3d 1033 (Kan. 2006); *Saldano* v. *State*, 70 S.W.3d 873 (Tex. Crim. App. 2002); *Booker* v. *State*, 511 So. 2d 1329 (Miss. 1987); *Gaskin* v. *State*, 615 So. 2d 679 (Fla. 1993); *Happ* v. *State*, 618 So. 2d 205 (Fla. 1993); *State* v. *Hallum*, 606 N.W.2d 351 (Iowa 2000).

Justice Marshall's point in *Hass* was that on remand a state court should be permitted to provide *greater* substantive protection for constitutional rights than this Court had prescribed. As we discussed in our opening brief (PM Br. 24 n.6), just the opposite—the use of state law to *curtail* federal rights—happened here.

on remand is "foreclosed from re-examining the grounds of our disposition").[3]

Plaintiff offers no response to our argument that the course of proceedings below is antithetical to the goal of sound judicial administration set forth in *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). See PM Br. 24-25. Instead, plaintiff argues that it would be "fundamentally unfair" to hold that she cannot rely on arguments "that the Oregon Supreme Court reached only after learning that it had misapplied federal law." Br. 52-53.

That contention is meritless. First, as we discuss below (at 22-23), the fact that the Oregon courts never addressed plaintiff's waiver arguments—which are significantly less complex than the underlying constitutional issue—during nine years of appellate litigation demonstrates, at a minimum, that the Oregon Supreme Court viewed those waiver arguments as insubstantial before this Court reversed its decision on the merits. See *Lee* v. *Kemna*, 534 U.S. 362, 380 (2002).

Second, plaintiff's assertion (Br. 3, 50-51) that the "procedural context" of this case somehow precluded the Oregon Supreme Court from reaching her state-law arguments earlier in the litigation is frivolous. The Oregon courts were perfectly free to rule

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[3] Plaintiff asserts that *Patterson* is "wholly inapplicable as it holds only that a litigant cannot invoke and a state court cannot rely on arguments *presented for the first time after remand* * * *." Br. 46-47 (emphasis in original); see also *id.* at 47 (distinguishing *Smith* on the same basis). But *Patterson* and *Smith* clearly hold that the lower court may not second-guess the underlying premise of this Court's decision remanding a case.

on those arguments at any time before this Court's decision on the merits in *Williams II*. The Court's order in *Williams I* vacating and remanding for further consideration in light of *State Farm* did not preclude the state courts from reaching plaintiff's state-law clams.

In any case, plaintiff has had a full opportunity to argue her state-law waiver points; indeed, she has presented them to this Court four separate times.[4] Those arguments did not deter the Court from reaching the merits and instructing the Oregon court to apply the constitutional standard, because as a matter of federal law they were inadequate to bar Philip Morris's clearly presented federal claim. And because the Oregon court previously "has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires." *Yates*, 484 U.S. at 217-18.

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[4] In this Court, plaintiff repeatedly argued that Philip Morris waived its constitutional claim by presenting its instruction on harms to non-parties on the same page as other instructions that misstated state law. Brief in Opp., No. 02-1553, at 15 n.6; Brief in Opp., No. 05-1256, at 22-24; Respondent's Br., No. 05-1256, at 46-49; Brief in Opp., No. 07-1216, at 24-32. Plaintiff's counsel appears to have conjured up an inexhaustible supply of such linguistic criticisms, which can be invoked at any time to avoid adverse decisions of this Court and escape its directions. Br. 20-25. This Court has not endorsed that "sporting theory of justice." *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 31-32 (1961).

II. THE GROUND OFFERED BY THE OREGON SUPREME COURT FOR REINSTATING ITS JUDGMENT WAS NOT ADEQUATE TO BAR RELIEF FOR THE CONSTITUTIONAL VIOLATION.

We argued in our opening brief that the state-law ground invoked by the Oregon Supreme Court was, in any event, inadequate to bar Philip Morris's due process claim. Plaintiff does not dispute that the preservation of a constitutional claim is a federal question. PM Br. 26. Philip Morris's request for protection of its constitutional rights was "plainly and reasonably made." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). See PM Br. 27-30; 127 S. Ct. at 1061, 1064 (finding that Philip Morris "asked" for a written instruction and "argued" in its favor at the charge conference). As applied in this case, the "correct in all respects" rule serves no legitimate purpose, and it has been neither firmly established nor regularly followed. Plaintiff barely responds to these arguments, and does not address the many decisions from this Court that consider the adequacy of state-law bars to federal claims. Instead, she devotes the majority of her brief to issues that are either irrelevant or undisputed.

A. Plaintiff Cannot Identify A Legitimate Purpose For The Procedural Bar Asserted Below.

In our opening brief, we reviewed the purpose of Oregon's "correct in all respects" rule. As state appellate courts consistently have declared, the rule exists to ensure that trial judges are not forced to "patch up" error-ridden instructional requests to make them conform to the law. PM Br. 30-31 (quoting *Hooning* v. *Henry*, 213 P. 139, 141 (Or. 1923)).

Plaintiff does not seriously dispute this explanation. See, *e.g.*, Br. 10. Because that rationale has no relevance here, however, she claims (Br. 42) that we have only "partially describe[d]" the purpose of the rule. But her proffered additional justifications add no more substance. The rule, she says, ensures "that counsel do their part in preventing courts from providing juries with erroneous instructions"; it is thus "an important element in avoiding flawed trials." Br. 43. All of this is uncontroversial, as are plaintiff's appeals to "judicial efficiency" and "finality." *Id.* But in 56 pages of briefing, plaintiff never explains how these goals are served by a requirement that a proposed instruction be correct in all respects, *including* respects that have nothing to do with the federal issue and even when the trial court considered (and rejected) the defendant's position on that issue independently and on the merits.

In this case, the trial judge rejected Philip Morris's request for an instruction on harms to non-parties not because she identified errors of state law in other portions of the proposed charge but rather because she believed that no "case law * * * says [the harm-to-others] element has to be there for the jury." J.A. 20a. Even if Philip Morris had atomized its requested instructions and printed each clause, sentence, or idea on a separate page, the judge still would not have given the requested instruction on harms to others. On the other hand, had the trial judge accepted defense counsel's constitutional argument, she could have given Philip Morris's correct charge on harms to non-parties, while rejecting the "unrelated" instructions (contained in a separate paragraph) now criticized by plaintiff. She would thus have avoided a "flawed trial" and an "errone-

ous" jury charge without assuming any editing responsibilities whatsoever.

In the face of that reality, plaintiff makes several implausible arguments. First, she argues that "[t]here * * * was no trial-level ruling rejecting the Philip Morris position on 'harm to others.'" Br. 16. She has made this argument before, and this Court has not accepted it, for good reason. See 127 S. Ct. 1061 (noting that trial judge "rejected" Philip Morris's instruction). We invite the Court to read the transcript of the relevant discussion, which runs from J.A. 17a through J.A. 20a. It is not ambiguous. The judge explicitly acknowledged (at 18a) that she needed to decide "whether there is a constitutional standard that I'm obliged to invoke here for the jury's consideration." She then indicated (at 19a) that there was no such standard. Defense counsel disagreed. The judge then asked (at 20a) if any "case law" required an instruction on harms to nonparties. Counsel answered that the requirement was embodied in *BMW* v. *Gore*—at the time, this Court's latest pronouncement on the subject. The judge then reiterated her decision that the instruction was unnecessary.

Faced with this clear record, plaintiff resorts to an even more implausible argument. She asserts (Br. 14-15) that the claim was waived because Philip Morris acquiesced in the judge's decision not to give the harm-to-others instruction. But when counsel said "okay" following the judge's unequivocal rejection of the proposed instruction, he clearly was not agreeing with the judge's position, with which counsel had expressly disagreed twice already. He was

simply acknowledging that he had lost the argument.[5]

Next, unable to explain how the rule as applied here would assist the trial judge, plaintiff resorts to recasting the rule as "a principle of appellate review," rather than "a rule of trial court procedure." Br. 38. She now *concedes* that "[t]he [Oregon Supreme Court], as did this Court in *Williams II*, *recognized that Philip Morris had preserved its due-process argument for appellate review* in the context of the failure to give its proposed instruction No. 34." Br. 49 (emphasis added). Yet she argues that Philip Morris's "successful preservation of that objection * * * could not foreclose consideration of a remaining state-law issue, specifically, whether it was error for the trial court to refuse a requested instruction that was not clear and correct in all respects." *Id.* On appellate review, plaintiff asserts, it does not matter what happened at the trial; an appellate court is free to ignore a trial judge's constitutional errors so long as the court can identify some unrelated instruction on the same page of the party's proposed charge that was not "correct."

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[5] There also is no merit to plaintiff's suggestion (Br. 14 n.2) that Philip Morris has no cause for complaint because the judge agreed to give an "alternative" instruction that defense counsel proposed. The "alternative" request was a fall-back proposal offered in the event that the court denied the primary request. It is commonplace in Oregon and elsewhere for counsel to offer such alternative requests; we are aware of no case (and plaintiff cites none) in which a court has suggested that a claim of instructional error can be waived in this way. See Oregon State Bar, *Civil Proceedings and Practice* § 40.8 (1994) ("If instructions are requested in the alternative, the preferred instruction should be listed first.").

This bizarre argument, made now for the first time and without citation to any authority, is belied by the long line of Oregon cases stating that the "correct in all respects" rule is intended to free trial judges of editing responsibilities. See PM Br. 30. In any event, the argument hardly advances plaintiff's position. Even if the trial court's decision to deny Philip Morris's request for a jury instruction was "not error" as a matter of state law, it *was* error as a matter of due process. *Yates*, 484 U.S. at 214-216.

The most significant problem with plaintiff's argument, however, is that such a rule would be wholly irrational. Plaintiff would have this Court believe that in Oregon, when a trial judge rejects an instructional request on the merits for a reason that is erroneous as a matter of federal law, the ruling is nonetheless not "error" if an appellate court is able to identify some unrelated point in a separate paragraph of the party's proposed charge that is stated incorrectly. Plaintiff thus proposes a game of "gotcha" in the Oregon appellate courts in which claims of instructional error are routinely denied regardless of their merit. The only justification for such a rule that plaintiff can muster is that it would "minimize[] costly retrials" and "achieve finality in judgments." Br. 43. In other words, according to plaintiff, Oregon appellate courts may choose to ignore valid requests for important due process protections because the State has an interest in eliminating meaningful appellate review of erroneous judgments. That implausible state interest, which has never been expressed by any Oregon court, is plainly not adequate to defeat a litigant's constitutional rights.

As this Court has held repeatedly, even rules that serve *important* state interests can still be in-

adequate to bar assertions of federal rights if those rules are applied in "exorbitant" or unnecessarily severe ways. *Flowers* illustrates this proposition. The respondent there made the same argument that plaintiff asserts here: that Alabama had a "long standing rule of frequent application that where assignments of error are argued together and one is without merit, the others will not be considered." Br. for Resp., No. 63-169, at 3. That rule had been applied for "sixty years" in "an unbroken line of decisions." *Id.* at 4. This Court nonetheless reversed, finding the state ground inadequate because the rule had been applied with "pointless severity" in the case before it. *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (cited at PM Br. 12, 32, 33). Plaintiff, who defends a rule that jury instructions proposed together may all be disregarded if one is without merit, nowhere addresses *Flowers* in her brief.[6]

In short, when plaintiff's explanation of Oregon law is compared to this Court's precedents, it is clear that the application of the correct in all respects rule here serves no legitimate or reasonable purpose. It

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[6] See also, *e.g.*, *Lee*, 534 U.S. at 376 (holding that a rule requiring written motions is "generally sound" but was nonetheless inadequate in that case to bar consideration of the federal claim); *Osborne* v. *Ohio*, 495 U.S. 103, 123 (1990) (recognizing that the state's general interest in "preventing trial courts from providing juries with erroneous instructions" was important, but still an inadequate basis for failing to charge the jury as due process requires). If the defendant in *Osborne* (who never requested a jury instruction) was entitled to a new trial before a properly-instructed jury, it follows *a fortiori* that Philip Morris (which proposed an instruction in writing that correctly stated federal law) is entitled to that relief.

therefore cannot be adequate to bar Philip Morris's federal claim.

B. Plaintiff Has Not Shown That The Procedural Bar Asserted Below Is "Firmly Established" Or "Regularly Followed."

Not only does the procedural bar at issue here serve no legitimate state interest; it also is neither "firmly established" nor "regularly followed." We demonstrated in our opening brief that prior to this case, no Oregon appellate court had ever invoked the "correct in all respects" rule to cast aside a *perfectly correct* instructional request, considered individually and rejected on the merits, simply because an appellate court is later able to identify an *unrelated* error in a *separately numbered* paragraph of the proposed jury charge. We also showed that the decision below conflicts with two separate aspects of previously-settled Oregon law: (i) the rule that litigants are not required to make "futile" and repetitive gestures in order to preserve an argument for appeal, and (ii) the "axiom" that Oregon courts do not reach federal constitutional issues if the case may be resolved by resort to state law.

Unable to rebut these points, plaintiff tries to change the subject. She devotes nine pages (Br. 20-29) to an elaborate history of the "correct in all respects" rule and a catalogue of supposed errors in Philip Morris's requested jury charge. But it is irrelevant whether the Oregon Supreme Court was right in finding that other paragraphs of Instruction 34 contained state-law "errors," or whether (as plaintiff asserts at Br. 23-25) the proposed charge included *additional* errors that were so trivial as to go unmentioned by *any* of the Oregon courts. The only question is whether such errors can properly justify

the trial court's refusal—for a different and unambiguously erroneous reason—to instruct the jury not to punish Philip Morris for harms to non-parties.[7]

1. Plaintiff Has Identified No Case In Which The "Correct In All Respects" Rule Has Been Applied In The Manner Asserted Below.

Plaintiff claims that the court below applied the "correct in all respects rule" in its "traditional manner" (Br. 33) and that Philip Morris was on notice that the Oregon courts require counsel to submit every sentence of a proposed instruction on its own

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[7] Even if these supposed errors had some genuine bearing on the proposed harms-to-non-parties charge, they were sufficiently inconsequential that reliance on them to foreclose a constitutional right deemed "important" by this Court (127 S. Ct. at 1064) would have been erroneous. Philip Morris's instruction asked the jury to consider only "illicit" profits because this Court had previously held that lawful business activities may not be penalized. See *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572-72 (1996). And Philip Morris used the word "may" instead of "shall" because the jury has broad discretion in setting the amount of punishment—and indeed in deciding whether to impose any punitive damages at all. There is no need to quote a statute verbatim in jury instructions, and important due process rights should not be nullified on the basis of such linguistic quibbling.

As for plaintiff's suggestion (Br. 21-22) that Philip Morris's request did not accurately reflect *federal* law, that argument has already been made—and rejected—in this Court. This Court held in *Williams II* that Instruction 34 properly "distinguished between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." 127 S. Ct. at 1064. And the Oregon Supreme Court assumed that the relevant portion of the instruction "clearly and correctly articulated the standard required by due process." Pet. App. 12a.

sheet of paper. Br. 28-29 & n.13. Neither argument has merit.

First, plaintiff's assertion (at 36) that "Oregon has consistently applied the rule as it was applied in this case, where the basis for rejecting the instruction was different than the legal point raised by appellant," is simply not true. *None* of the cases cited at Br. 36 or anywhere else in plaintiff's brief stands for the proposition she asserts: that it is permissible to refuse a correct instruction on a discrete legal issue because a separately designated paragraph on a distinct point of law contains an error.[8]

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[8] In none of the cases did the court find that *any* part of the proposed instruction was valid. In fact, most of the decisions indicate that the entire proposal was properly rejected, either because it was erroneous in all pertinent respects or because the relevant legal propositions were contained elsewhere in the charge that was given. See *Owings* v. *Rose*, 497 P.2d 1183, 1188 (Or. 1972); *State* v. *Reyes-Camarena*, 7 P.3d 522, 528 (Or. 2000); *Schultz* v. *Shirley*, 220 P.2d 86, 88 (Or. 1950); *Burke* v. *American Network, Inc.*, 768 P.2d 924, 925-27 (Or. Ct. App. 1989). In the two other cases, the court rejected instructional requests because the proposing party *never actually proposed a specific instruction*, and instead merely cited a set of statutes. The Oregon Supreme Court deemed such requests "wholly insufficient." *Hotelling* v. *Walther*, 148 P.2d 933, 935 (Or. 1975); *Beglau* v. *Albertus*, 536 P.2d 1251, 1255-56 (Or. 1975).

The cases cited at Br. 28 are similarly inapposite, as are those in plaintiff's "appendix" and those cited by the amicus Oregon trial lawyers. See, *e.g.*, *Simpson* v. *Sisters of Charity of Providence*, 588 P.2d 4, 13 (Or. 1978) (requested instruction covered a single topic and incorrectly stated the relevant standard; "valid" portions of charge were adequately expressed in other instructions given to jury); *Dacus* v. *Miller*, 479 P.2d 229, 232 (Or. 1971) (requested instruction was "technically incorrect" and "confusing" in its entirety); *McCaffrey* v. *Glendale Acres, Inc.*, 440 P.2d 219, 222 (Or. 1968) (requested charge in-

Plaintiff's assertion that *this* Court has endorsed the rule as applied below is equally baseless. In *Harvey* v. *Tyler*, 69 U.S. 328 (1864) (cited at Br. 35-36), the trial court denied a series of requested instructions, even though some were proper. This Court upheld the denial *not* because the instructions were requested as part of a series, but because counsel failed to offer anything other than a general objection to the denial. See *id.* at 339. See also *Beaver* v. *Taylor*, 93 U.S. 46, 54, 55 (1876) (cited at Br. 35) ("If the *entire charge* of the court is excepted to, or a series of propositions contained in it is *excepted to in gross*, and any portion thus excepted to is sound, the exception cannot be sustained. * * * An exception to such portions of a charge as are variant from the requests made by a party, *not pointing out the variances*, cannot be sustained.") (emphasis added).

Of course, counsel in this case did precisely what *Harvey* and *Beaver* held was required: he called his specific request to the trial court's attention and received a specific ruling. PM Br. 29-30. In modern times, moreover, this Court has rejected exactly the type of "correct in all respects" argument that plaintiff presents here to nullify constitutional rights. See *Flowers*, 377 U.S. at 297.

Second, there is no merit to plaintiff's argument (see, *e.g.*, Br. 28 n.12, 29 n.13, 35 n.18) that Philip Morris's submission departed from traditional Oregon practice. It is demonstrably wrong to assert (see, *e.g.*, Br. 6) that there is anything unusual about re-

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correctly stated a single, discrete point of law); *Roop* v. *Parker Northwest Paving Co.*, 94 P.3d 885, 903-04 (Or. Ct. App. 2004) (same). It is no wonder that the Oregon amicus brief acknowledges (at 9, 12) that such cases are not "on point" or "on all fours."

questing a punitive damages instruction that groups several different legal points under one heading. Indeed, the Oregon *pattern instruction* on punitive damages, which plaintiff cites as a model of proper form (Br. 33-34), does just that. See U.C.J.I. § 75.06.

It is likewise incorrect to suggest (see Br. 34-35) that a party departs from standard practice by offering variations from the form instruction. In fact, the current version of the pattern instruction on punitive damages contains an express "caveat" that *encourages* both litigants and judges to edit the pattern in order to conform to developments in federal constitutional law. See *id.* (warning judges to "consider whether recent Oregon or federal decisions make this instruction incorrect or obsolete" and encouraging parties to propose alterations to the pattern to take into account the "rapidly evolving * * * law on the subject of punitive damages").

Similarly, the suggestion made in plaintiff's brief (and embellished by the amicus trial lawyers) that informal "tips" in bar publications put Philip Morris on notice that proposing a single punitive damages instruction would cause it to forfeit its due process rights is wrong, both legally and factually. See Br. 28-29 & nn.12, 13. "Practice tips" from bar organizations are not pronouncements from courts or legislatures; they cannot put a party on notice of legal rules. In any event, the publications plaintiff cites all post-date the trial in this case by many years. Thus, even putting aside whether those *sorts* of documents could validly give notice of a state waiver

rule not embodied in the decisional law, *these* documents manifestly did not.[9]

2. Plaintiff Has Failed To Reconcile The Decision Below With State *v.* George.

In our opening brief (at 36-39), we showed that the decision below conflicts squarely with clear precedent from the Oregon Supreme Court. That court's opinion in *State* v. *George* states that Oregon's "requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." 97 P.3d 656, 662 (Or. 2004). Accord, *James* v. *Kentucky*, 466 U.S. 341, 349 (1984) (federal law likewise does not require litigants to engage in "arid ritual[s] of meaningless form" to preserve their claims); *Osborne*, 495 U.S. at 124 (same). Here, just as in *George*, the trial judge ruled that she would not give an instruction on the legal point counsel wished to present to the jury. "Redrafting" the instruction to eliminate the alleged errors of state law, or submitting the harms to nonparties charge on its own page (as plaintiff suggests Philip Morris should have done, Br. 39 & n.19) would

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[9] Plaintiff points to the fact that Philip Morris organized its instructional requests differently when defending another case in Oregon three years after the *Williams* trial. See Br. 30 (discussing *Schwarz* v. *Philip Morris Inc.*, 135 P.3d 409 (Or. Ct. App. 2006)). But Philip Morris's proposed instructions in a later case say nothing about whether the company was on notice in 1999 that its submission of a combined instruction, modeled after Oregon's pattern instruction, would cause it to forfeit its constitutional claim. There are various ways to preserve a claim under both federal principles and state law. The Oregon pattern instructions show that state law has not heretofore *required* lawyers to waste paper and burden the trial court by breaking up their requests with each thought on a different page, though they may *choose* to do so.

not have made the slightest difference. The trial judge did not reject the instruction on harms to non-parties because it was combined with others that misstated Oregon law; she rejected the instruction because she believed due process did not require it.

Plaintiff asserts that *George* is inapplicable because an alternative holding in that case rested on a criminal statute that *required* the trial court to give the instruction at issue "without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." Br. 31. But the fact that *George* articulated an alternative basis for the decision does not render the court's pronouncement about "futility" mere "*dictum*," as plaintiff asserts. The court stated very clearly that it was rejecting the state's waiver argument "for two reasons," each independently sufficient. 97 P.3d at 661; see also *Schwarz*, 135 P.3d at 439-40 (Linder, J., concurring).

At bottom, plaintiff offers no response to our actual argument—that "resubmitting" a proposed instruction would have been just as futile in this case as in *George*. Her laborious parsing of that decision misses the point: *George* demonstrates that the Oregon Supreme Court does not regularly or consistently apply the "correct in all respects" rule in the rigid, pointless manner it did here. To the contrary, the application in this case represents a sharp break from precedent.

3. Plaintiff Offers No Defense Of The Oregon Court's Departure From The Established Decisional Hierarchy.

For decades, Oregon appellate courts have been clear that as a matter of state practice, they will ad-

dress all potentially dispositive issues of state law before reaching federal constitutional questions. See PM Br. 40-42. Here, of course, two different Oregon appellate courts, in three separate decisions issued over the course of nine years, consistently reached the merits of Philip Morris's constitutional claim—even though plaintiff had, equally consistently, pressed various state grounds for affirmance. This circumstance strongly indicates that prior to this Court's *Williams II* remand, the Oregon courts viewed plaintiff's state-law arguments as insubstantial. As in *Lee*, 534 U.S. at 380, it weighs heavily against a finding of adequacy.

Plaintiff does not respond to this argument, except to note that Oregon's "first things first" rule is a "prudential state practice" (Br. 48) and that "[n]othing in federal law requires a state court to dispose of state issues first" (Br. 49). Both of those statements are accurate but beside the point: for many years, the Oregon courts have consistently imposed the "first things first" rule on *themselves*. See PM Br. 41 (citing numerous cases).

Plaintiff cites no authority that even questions the applicability of this principle. She cites only one Oregon case in this section of her brief, and that decision holds precisely the *opposite* of what she says it does. In *Oregon* v. *Kennedy*, 666 P.2d 1316 (Or. 1983), the Oregon Supreme Court emphasized "the practical importance of the rule * * * that all questions of state law be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states." 666 P.2d at 1318. The lower court's failure to follow that rule had wasted "a good deal of time and effort" and "needlessly spur[red] pro-

nouncements by the United States Supreme Court on constitutional issues." *Id.* at 1319.

Given this consistent tradition of addressing state-law issues first, the string of Oregon court decisions resolving the federal claims in this case demonstrates that the courts below attached no importance to plaintiff's state law waiver arguments.[10] Just as it did in *Lee*, this Court should find the belated state law waiver theory inadequate to defeat a federal claim.

III. PLAINTIFF OFFERS NO VALID REASON FOR DENYING PHILIP MORRIS A NEW TRIAL.

Plaintiff devotes few words to the principal issue that was actually left open for the Oregon court to address on remand—the appropriate remedy for the trial court's instructional error. Plaintiff does not de-

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[10] The retired Oregon Supreme Court justices assert that the supposed state-law errors cited by the court below "ripened for consideration" only after this Court's remand. Ret. Just. Br. 6. That is not true. These issues were before the Oregon courts from the beginning; they were identified in plaintiff's briefs and argued (in some form) at every stage of the appellate process. If they had any merit, they could have been invoked to affirm the judgment at any stage.

The retired justices further claim that the Oregon courts complied with the "first things first" rule because in its first decision in this case, the Oregon Supreme Court purported to decide the "harm-to-others" question under both state and federal law. But consideration and denial of Philip Morris' claim on the merits necessarily entailed an analysis of federal constitutional law, which in fact dominated the court's opinion. Pet. App. 40a-66a. That analysis would have been completely unnecessary had the court found any of plaintiff's waiver arguments to be meritorious.

fend the legitimacy of her lawyer's closing argument, which asked the jury to punish Philip Morris for injuries to all the "other Jesse Williams[es] in the last 40 years in the State of Oregon." She does not dispute that the evidence and argument presented at trial gave rise to a significant risk of unconstitutional punishment for harms to non-parties; nor does she contend that the trial court's failure to protect against that risk was harmless error. See PM Br. 42-45. And she offers no response to our argument that a remittitur cannot cure constitutional instructional error. PM Br. 46-48. She argues only that it would be unfair to her if the case is re-tried at this late date, because "justice delayed is justice denied." Br. 54.

Apart from its obvious deficiencies, plaintiff's argument overlooks the fact that she has no due process right to recover punitive damages. Even a valid award of punitive damages is a windfall to which a plaintiff has no right under federal or state law. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages."); *Smith* v. *Wade*, 461 U.S. 30, 52 (1983) ("a key feature of punitive damages [is that] they are never awarded as of right, no matter how egregious the defendant's conduct"). The Oregon courts recognized this when they upheld the Oregon split-share statute, under which the State of Oregon—which has filed an *amicus curiae* brief in this case to protect its monetary interest—is entitled to 60 percent of any punitive damages award. *DeMendoza* v. *Huffman*, 51 P.3d 1232, 1245 (Or. 2002) ("[A] plaintiff has no right or entitlement to punitive damages as a remedy * * *.").

Even more fundamentally, plaintiff has no right to recover any judgment that is the product of an unconstitutional procedure. She obtained the punitive award at issue here—which now exceeds $145 million—by asking the jury to punish Philip Morris for injuries to thousands of hypothetical Oregonians whose claims were never presented, much less proven. Indeed, even now she continues to defend the award based on alleged injuries to "millions of American smokers." Br. 1. Having chosen to make that argument at trial, she cannot wave away Philip Morris's right to challenge it.

Finally, the length of this litigation cannot fairly be attributed to Philip Morris, which was not responsible for the original error and which has never wasted any time in seeking relief from it. This Court has remanded the case to the Oregon courts twice, and—prompted by plaintiff—the Oregon courts have erroneously reinstated the judgment each time. That is why we now ask this Court to exercise its power to order a new trial.

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted.

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
SCOTT A. CHESIN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF ASSOCIATED OREGON INDUSTRIES, NORTHWEST GROCERY ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, OREGONIANS FOR FOOD & SHELTER, OREGON METALS INDUSTRIES COUNCIL, AND OREGON RESTAURANT ASSOCIATION, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

THOMAS W. BROWN
Counsel of Record
Cosgrave Vergeer Kester LLP
805 SW Broadway
8th Floor
Portland, OR 97205
(503) 323-9000

JOEL S. DEVORE
Luvaas Cobb
777 High Street
Suite 300
Eugene, OR 97405
(541) 484-9292

Counsel for Amicus Curiae

QUESTION PRESENTED

The Oregon *amici* address the following question: Whether, after this Court has adjudicated the merits of a party's federal constitutional claim and remanded the case to the state court with instructions to "apply" the correct constitutional standard, the state court may instead hold the federal claim forfeited by interposing a state-law procedural rule in a way that serves no legitimate state interest and is neither firmly established nor regularly followed.

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BRIEF OF ASSOCIATED OREGON INDUSTRIES, NORTHWEST GROCERY ASSOCIATION, OREGON FOREST INDUSTRIES COUNCIL, OREGONIANS FOR FOOD & SHELTER, OREGON METALS INDUSTRIES COUNCIL, AND OREGON RESTAURANT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

I. INTRODUCTION

A. Statement of Interest of *Amici Curiae* [1]

Associated Oregon Industries (AOI) is a nonprofit, statewide business and lobbying organization representing more than 1600 members, employing approximately 200,000 people. Members include manufacturing, retail, agriculture, technology, healthcare, and construction companies located throughout Oregon.

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[1] Pursuant to Rule 37, these *amici* state: (1) all parties have consented to this brief; (2) notice of intent to file this brief was given to plaintiff within the time required by Rule 37; (3) no counsel for any party has authored this brief; and (4) no party or entity, other than the Oregon *amici*, their members or their counsel, has made any monetary contribution to the preparation or submission of this brief.

The Northwest Grocery Association (NWGA) is a nonprofit association representing the retailers, wholesalers, brokers, manufacturers and suppliers that support the Oregon's grocery industry.

Oregonians for Food & Shelter (OFS) is a non-profit coalition of natural resource based businesses in Oregon. It includes over 13,000 individuals and businesses.

The Oregon Forest Industries Council (OFIC) represents Oregon's forest products industry. The industry employs over 85,000 people statewide.

The Oregon Metals Industries Council (OMIC) represents the interests of Oregon metal manufacturers. Its members employ over 60,000 people in Oregon.

The Oregon Restaurant Association (ORA) is the leading business association for more than 9,000 Oregon restaurant and hospitality businesses and their suppliers in the state. Its members employ a work force of more than 110,000.

AOI, NWGA, OFS, OFIC, OMIC and ORA (the Oregon *amici*) urge this Court to correct the Oregon Supreme Court's refusal to address this Court's instruction to the Oregon court that it provide Philip Morris with the protection due process required.

B. Summary of Argument

Previously, this Court found that an instruction requested by Philip Morris would have correctly advised the jury to consider but not punish it for harm to non-parties. This Court concluded that the Due Process Clause of the Fourteenth Amendment requires such an instruction or some comparable protection. The Court remanded the case to the Oregon Supreme Court to assure Philip Morris this safeguard.

Instead of following this Court's mandate, the Oregon Supreme Court adhered to its prior decision. Although the court had addressed the merits of the federal due process question before, on remand it did not. Turning to state law, the court discovered separate portions of Defendant's Requested Jury Instruction No. 34 (Instruction No. 34) that contained unrelated misstatements about punitive damages. And with that discovery, the court invoked its procedural rule that, in order to reverse for refusal to give an instruction, the instruction must be "correct in all respects." On that basis, the court affirmed the trial court judgment without providing the constitutional protection this Court mandated be provided to Philip Morris.

The Oregon Supreme Court's latest decision does not rest upon adequate and independent state grounds. Before this case, the "correct in all respects" rule was not firmly established and regularly applied

when, as here, the trial judge declared that she would not give the "harm to non-parties" instruction, no matter how it was written and, presumably, no matter how any other paragraph of Instruction No. 34 might have been written. In fact, in 2004, the court held that the rule had no application in such circumstances. Nor has the "correct in all respects" rule been firmly established or regularly applied by the Oregon Supreme Court to affirm a verdict that is a product of a misinformed jury.

The rule as applied served no legitimate state purpose. The trial judge chose to engage counsel in an interactive exchange in which the judge constructed a composite jury instruction, line by line, from the parties' competing drafts and alternative paragraphs. Even if the "correct in all respects" rule were otherwise sound, its application here was too "exorbitant" for this Court to permit the rule to bar the federal constitutional protection the Court previously recognized. For these reasons, the Court should reiterate its instruction that the Oregon court afford Philip Morris due process.

II. ARGUMENT

A. This Court's Prior Decision

This Court has ruled that "[t]he Constitution's Due Process Clause forbids a state to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they

directly represent, *i.e.*, injuries that it inflicts upon those who are, essentially, strangers to the litigation." *Philip Morris USA v. Williams,* 127 S. Ct. 1057, 1063 (2007). The Court explained that, although a jury may consider harm to non-parties in evaluating the reprehensibility of a defendant's conduct, the jury may not "go further than this and use a punitive damages award to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. This Court concluded that "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one," that "it is particularly important that States avoid procedure that unnecessarily deprives juries of proper legal guidance, and that where the risk of jury confusion is "a significant one, * * * a court, upon request, must protect against that risk." *Id.* "Although States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Id.* at 1065 (emphasis in original).

As to Instruction No. 34, this Court observed that it "distinguishes between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Id.* at 1064. The Court recognized that Philip Morris had argued below that the Constitution prohibits the state from using punitive damages to punish a defendant for harm to non-

parties and that the Oregon Supreme Court had rejected that argument on its merits. *Id.* Because the wrong constitutional standard had been applied, this Court vacated the judgment and remanded "so that the Oregon Supreme Court can apply the standard we have set forth." *Id.* at 1065.

B. The Case on Remand

On remand, the Oregon Supreme Court declined to apply the constitutional standard this Court recognized. Instead, the court adhered to its prior decision, finding errors of state law in other, unrelated sections of Instruction No. 34. *Williams v. Philip Morris USA*, 344 Or. 45, 176 P.3d 1255 (2008). The court found that the instruction contained two other statements that did not accurately reflect Oregon statutory law on punitive damages. When introducing a list of factors to consider in awarding punitive damages, the instruction would have told jurors that they "may" consider the factors, when the jurors should be told they "shall" consider the factors. At paragraph (2)(c), the instruction would have described one factor as a consideration of Philip Morris's motivation to earn "illicit profits." *Id.* at 57, 176 P.3d at 1261-62. The court concluded that, under state law, the trial court properly rejected Instruction No. 34 in its entirety, since it was not "correct in all respects." *Id.* at 61, 176 P.3d at 1263-64.

C. The Judge's Review of Instruction No. 34

Although it missed the significance, the Oregon Supreme Court recognized the special nature of the trial judge's conference on jury instructions. The court observed:

> "The trial court analyzed the proposed jury instructions line-by-line with the parties, during which time Philip Morris argued that the consider-but-don't-punish part of proposed jury instruction No. 34 was needed to ensure that this plaintiff did not receive punitive damages that should be awarded (if they were to be awarded at all) to other plaintiffs. After the trial court had reviewed Philip Morris's proposed jury instruction No. 34 together with plaintiff's proposed jury instruction on punitive damages – the transcript of that part of the trial court's analysis is 50 pages long—the trial court declined to give proposed jury instruction No. 34 as proffered."

344 Or. at 50-51, 176 P.3d at 1258.

The court's description does not fully capture Instruction No. 34 or what happened at the instructions conference. Instruction No. 34 was comprised of different topics concerning punitive

damages. (Petition For Certiorari Appendix [Pet. App.] 159a-160a). Each topic was presented as a separate paragraph. Some concerned state law; others concerned federal constitutional law. (*Id.*) After six preliminary paragraphs, a seventh paragraph introduced a list of factors for consideration in setting the amount of punitive damages. The list was numbered. The disputed issue here appeared in a numbered factor (1), followed by an alternative paragraph (1), which together clearly indicated the severable nature of the paragraphs. (*Id.*)

The trial judge treated the paragraphs of the parties' competing instructions as severable. She worked through each paragraph and subsection of Instruction No. 34 with the parties, solicited comment, and decided whether to give each particular subsection of the instruction. (Pet. App. at 155a-162a.) In the end, the court settled on a composite instruction.

As to the "harm to non-parties" paragraph, Philip Morris argued that the instruction was required by the federal constitution. (*Id.* at 157a-158a, 162a.) The trial judge considered that argument separately, asking if there was a case "that says this element has to be there for the jury" and commenting rhetorically "why wander where no judge has been told to go before?" The judge eventually rejected that part of Instruction No. 34 on its merits, *id.* at 161a-162a, a decision unaffected by other unrelated paragraphs of

the instruction or by the fact that various issues on punitive damages appeared under one title ("Punitive Damages – Products Liability) or under one instruction number ("Defendant's Requested Jury Instruction No. 34").

D. No "Adequate State Ground"

a. Still a Federal Issue

"This Court will not take up a question of federal law presented in a case "'if the decision of [the state] court rests upon a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (emphasis in original) (*citing Coleman v. Thompson*, 501 U.S. 772, 729 (1991)); *see also Lee*, 534 U.S. at 375 (adequacy of state law ground "is itself a federal question."). To be adequate to avoid a federal question, the state rule must be a "firmly established and regularly followed state practice," and must further a legitimate state interest. *James v. Kentucky*, 466 U.S. 341, 348-49 (1984). Even then, there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." *Lee*, 534 U.S. at 376.

In *Lee*, a bona fide rule requiring a motion to postpone to be made in writing would not stop consideration of the federal question, where the trial judge heard an oral motion to postpone and would

not have considered a written motion any differently. The state rule failed its purpose. The rule was too "exorbitant" an application to deny the federal right. *See also Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (state rule requiring contemporaneous objection to instruction served "no perceivable state interest" when defendant had urged the same point without success in a pretrial motion).

In *NAACP v. Alabama*, 377 U.S. 288 (1964), the state court invoked its procedural rule "of long standing and frequent application" that, where unrelated assignments of error are argued together, all will fail if any one is without merit. *Id.* at 295. The state court had used its rule to avoid this Court's prior decision. This Court rejoined that the brief's structure was "a mere stylistic device." The rule was satisfied in substance. Indeed, the state had not observed the rule in the same way before. "Pointless severity" would not go unnoticed. No adequate state ground prevented consideration of the federal issue. *See also Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (state procedural requirements not strictly or regularly followed cannot frustrate consideration of federal issue).

In this case, none of these federal standards are met. The Oregon high court applied the "correct in all respects" rule in a way that not only had not been firmly established or regularly followed but in a way inconsistent with the leading state case on point. The rule as applied did not serve its purpose. And,

even if the rule were sound and applied as it regularly had been, its application here was too "exorbitant" to frustrate consideration of a principle of due process assured by the Fourteenth Amendment.

b. Belated Discovery of State Rules

Nearly 30 years ago, Oregon's appellate courts formally adopted a "first things first" analytical priority when resolving cases, first deciding statutory or common law issues before reaching constitutional issues, and then deciding state constitutional issues before reaching federal constitutional issues. *State v. Sharf*, 288 Or 451, 605 P2d 690 (1980). The "first things first" principle has since been routinely applied by Oregon's high court. *See, e.g., State v. Acremant*, 338 Or. 302, 321, 108 P.3d 1139, 1151 (2005); *Zockert v. Fanning*, 310 Or. 514, 520, 800 P.2d 773, 776-77 (1990); *Planned Parenthood Ass'n v. Dep't of Human Res.*, 297 Or. 562, 654, 697 P.2d 785, 787 (1984). When this case was first before the Oregon court, the analytical rule was thus well-established. *See Li v. State*, 338 Or. 376, 391, 110 P.2d 91, 99 (2005); *State v. Moore*, 334 Or. 328, 336, 49 P.3d 785, 790 (2002); *State v. Joslin*, 332 Or. 373, 380, P.3d 1112, 1116 (2001) (all applying rule). So were its limited exceptions. *Stevens v. City of Cannon Beach*, 317 Or. 131, 135 n.5, 854 P.2d 449, 451 n.5 (1993), *cert. den.*, 510 U.S. 1207 (1994) (when a party's failure to articulate an independent state-law argument led the court to "assume" the

constitutional analyses would be the same at both the state and federal levels); *GTE Northwest, Inc. v. Public Utility Commission*, 321 Or. 458, 468 n.6, 900 P.2d 495, 501 n.6 (1995), *cert. den. sub. nom., Oregon PUC v. GTE Northwest*, 517 U.S. 1155 (1996) (same); *State v. Harberts*, 331 Or. 72, 81, 11 P.3d 641, 647 (2000) (where unique circumstances lead the court to deliberately depart from the doctrine for prudential reasons) *State v. Ivory*, 278 Or. 499, 503, 654 P.2d 1039, 1041 (1977) (relying on same principle).

The well-established priority of state issues suggests that, when the Oregon Supreme Court decided the federal question in its initial opinion, the court did not think that it should apply the "correct in all respects" rule. *Only* when this Court rejected the court's view of due process did the court choose to apply its "first things first" rule on analytical priority, and then to apply its "correct in all respects" rule on jury instructions. *Williams*, 344 Or. at 55, 176 P3d. at 1260. The belated application of these rules was never explained. The tardy discovery of these rules is an irregularity requiring this Court to scrutinize carefully whether the decision on remand truly rests on adequate state grounds.

c. Limited Purpose of the "Correct in All Respects" Rule

The "correct in all respects" rule for instructions has been part of Oregon law for at least 90 years. *Sorenson v. Kribs*, 82 Or. 130, 147, 161 P.

405, 411 (1916). The limited purpose of the rule is to promote judicial economy. It spares trial judges the task of drafting or editing jury instructions. The rationale for the rule has always been that "[t]he trial court cannot be required to edit requested instructions and to omit parts that are incorrect or inapplicable." *Beglau v. Albertus*, 272 Or. 170, 179, 536 P.2d 1251, 1256 (1975) (citing *Brigham v. Southern Pacific Co.*, 237 Or. 120, 124, 390 P.2d 669, 671 (1974)).

Before its latest opinion, the Oregon Supreme Court had never regularly interposed the "correct in all respects" rule when a trial judge, abandoning the passive model, reviewed each subpart of a requested instruction, and decided to draft a collaborative instruction with the participation of the parties paragraph by paragraph. Neither had the court regularly used the rule to permit a verdict to stand when the jury was not properly instructed on the law – certainly not when the jury was instructed inconsistently with the federal constitution. *Cf. NAACP*, 377 U.S. at 297 (when seeming noncompliance with state rule was more a matter of style than substance, the rule's application was "pointless severity").

None of the three cases relied on by the Oregon Supreme Court show that the "correct in all respects" rule is firmly established and regularly followed in such circumstances. *See Hernandez v. Barbo Machinery Co.*, 327 Or. 99, 957 P.2d 147 (1998) (court

reversed and remanded for a new trial for failure to give a requested instruction that was *not* correct in all respects); *Beglau v. Albertus*, 272 Or. 170, 536 P.2d 1251 (1975) (trial court had not abused its discretion to grant a new trial upon concluding that the jury should have been instructed on particular subject about the use of headlights); *Owings v. Rose*, 262 Or 247, 497 P2d 1183 (1972) (court applied the "correct in all respects" rule to avoid reversal of a judgment that was based on the verdict of a correctly informed jury). While each of the three cases contains a discussion of the "correct in all respects" rule, the court reversed two of the cases for a new trial notwithstanding the rule. In the third case, the court applied the rule in service of the goal of correctly informing juries about the law. None of the cases applied the rule to affirm a verdict that was the product of a misinformed jury.

In summary, the purpose of the "correct in all respect" rule is pragmatic and limited. The application of the rule has never been severe or pointless. Before this case, the rule had neither been firmly established nor regularly applied in the circumstances of this case.

d. Conflict with Precedent – *State v. George*

As employed here, the "correct in all respects" rule cannot be reconciled with the precedent most applicable to these facts. In *State* v. *George*, 337 Or.

329, 97 P.3d 656 (2004), the Oregon Supreme Court held that where a judge rejects a proposed instruction and concludes that the jury should not be instructed on the subject at all — because the judge disagrees with the legal proposition, not the wording of the instruction— there is no need to submit a revised instruction. The court explained that "[o]ur requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." *Id.* at 339, 97 P.3d at 661-62.[2]

Since the trial judge had specifically decided that the "harm to non-parties" instruction was a point of law on which the judge would not instruct – no matter what the wording – *George* became the controlling precedent. So, just as in *George*, it would have been a futile gesture for Philip Morris's counsel to redraft Instruction No. 34 or to separate the instruction's disputed paragraph (1) from its other paragraphs. *Cf. Lee*, 534 U.S. at 375-76 (to have made a written, rather than a verbal, motion would have been a futile formality).

Oddly, the Oregon Supreme Court never mentioned *George* in its opinion. Yet, the court was well aware of the case, a fact made clear by colloquy

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[2] This court recognized the same proposition in *Osborne*, 495 U.S. 103, ruling that a party has no duty to ask for a jury instruction on a point of law that the trial court has already rejected. *Id.* at 124.

during oral argument between Philip Morris's counsel and the justice who penned *George and* who later would write the court's opinion on remand. The transcript reveals:

> MR. GARY: The Court—the Supreme Court will defer to state court procedural rules, so long as the rules are consistently applied, and so long as they serve a legitimate state purpose. I think that's exactly consistent with what this court has said in its own preservation rulings; that is, in *George* you recognize the application of the correct-in-all-respects rule would not make any sense in terms of the purposes that preservation is designed to serve –
>
> JUSTICE GILLETTE: Our interpretation as to whether *George* is binding, useful or irrelevant, however, is an interpretation which, given any of those three possibilities, the United States Supreme Court wouldn't care about for one second. That is to say, it assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on* * * *George*, for the Court to assume anything different nor for you to claim anything different, Mr. Gary.

> MR. GARY: I can't really say that I agree with that until I see what the Court has to say. But of course the Supreme Court has presumed that this court acted in good faith, as do we – [.]

(Pet. App. at 180a-181a).

The Oregon high court invoked the "correct in all respects" rule in its decision on remand in the exact circumstance *George* held the rule would not properly apply. Given that fact, that the three authorities relied on by the court are distinguishable, that no prior decision had invoked the rule where a court chose to craft a collaborative instruction "line by line," or where the jury had been misinformed, this Court should conclude that the "correct in all respects" rule had not been regularly and consistently applied by the Oregon Supreme Court in the way it was applied in this case. *Cf. NAACP*, 377 U.S. at 297 (rejecting unusually strict application of state rule). The rule thus cannot be an adequate state ground to avoid the federal question.

e. The State Rule As Applied Fails Its Limited Purpose

Whether or not firmly established, the "correct in all respects" rule as applied in this case did not serve any "legitimate state purpose." It is certainly true, as the Oregon Supreme Court observed, that "[i]t is not enough . . . to offer a proposed instruction

that is correct in part and erroneous in part, leaving the trial court to solve the problem for itself." *Williams*, 344 Or. at 56, 176 P.d at 1261 (citation omitted). That criticism presupposes a passive role by the trial judge. That is not what happened here. Although the judge was not required to have drafted an instruction, the judge voluntarily undertook with counsel a deliberative effort to review and edit the proposed competing instructions, paragraph by paragraph. The court thus invited a collaborative process in which "line by line" and "issue by issue" the paragraphs offered were accepted or rejected, one-by-one, and the given instruction was constructed.

Since the purpose of the "correct in all respects" rule is to avoid forcing the judge to draft an instruction, the rule serves no purpose when the judge chooses to draft an instruction. That task which the rule seeks to avoid, the judge voluntarily undertook. The trial court's decision to work collaboratively with counsel made the "correct in all respects" rule irrelevant.

Moreover, the appearance of a series of paragraphs in a single instruction was no added trouble. The trial court was no more burdened by separate paragraphs of an instruction printed on the same page than it would have been if they had been printed on separate pages. Where the judge chooses to draft instructions – rather than simply adopt those the parties submit – it no longer matters if a number

of paragraphs appear under one heading about punitive damages.

When requested instructions appear in separate paragraphs on *different points of law*, when each is argued separately by counsel, and when each is considered separately by the trial court, the "correct in all respects" rule no longer serves a legitimate purpose. *See Douglas v. Alabama*, 380 U.S. 415, 422 (1983) ("an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests"); *Lee*, 534 U.S. at 385 (even a state rule of "undoubted legitimacy" cannot bar consideration of federal rights if the rule has been "substantially met" by the defendant). And, when a state rule serves no legitimate state interest, the rule cannot be used to avoid the federal question. *See NAACP*, 377 U.S. at 297 (state court's insistence on "pointless severity" cannot bar federal rights).

f. The State Rule's Application Was Too Exorbitant

Finally, the "correct in all respects" rule was too inconsistently applied, too unusually applied, too inappropriate, too senseless, and too "convenient" to be an adequate state ground. Even if the rule might be sound generally or even in other circumstances, its application on these facts was too "exorbitant" to deny Philip Morris its constitutional right to due

process.[3] *See Lee*, 534 U.S. at 385 (explaining when sound state rule is no bar to federal issue in particular case).

III. CONCLUSION

Like the Oregon *amici*, this Court should be troubled by the Oregon Supreme Court's opinion on remand. The ultimate goal in any case tried to a jury (and the Oregon Supreme Court's constitutional mandate) is to assure that cases are adjudicated by fact finders based on the law the federal constitution

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[3] Indeed, that conclusion is fully supported by an analogy to a well-established qualification on a state rule of appellate review. Oregon courts will affirm a trial court if it was "right for the wrong reason" *unless* the aggrieved party might have created a different record below if the prevailing party had raised the new found reason below. *Outdoor Media Dimensions, Inc. v. State*, 331 Or 634, 659-60, 20 P.3d 180, 195-96 (2001). The qualification could be borrowed and the idea compared in this setting. If plaintiff had objected to the unrelated portions of Instruction No. 34 or complained that separate issues were offered in one instruction, Philip Morris *could easily* have made a different record here by offering the separate issues in separate instructions.

mandates. Oregon's high court lost sight of that goal. It strained to find an "independent and adequate state ground" that left Philip Morris without an assurance of due process this Court recognized was required and in jeopardy of punishment for harm to non-parties.

The application of a state rule that is not firmly established and regularly followed, does not serve any legitimate state interest, and is exorbitant as applied is not an "adequate and independent state ground." The "correct in all respects" rule as applied here cannot properly preclude the constitutional protection this Court directed should have been afforded Philip Morris at trial.

The last time this Court considered this case, concerned Oregon business groups observed that it was "time for the Court to [set] clear standards and clear limits on punitive damages awards that Oregon courts cannot ignore or avoid." This Court did its job. The Oregon Supreme Court did not. The Oregon *amici* respectfully urge this Court to again reverse

and remand to the Oregon court for it to comply fully with the Court's prior decision.

DATED this 20th day of August, 2008.

THOMAS W. BROWN
Counsel of Record
Cosgrave Vergeer Kester LLP
805 SW Broadway, 8th Floor
Portland, OR 97205

JOEL S. DEVORE
Luvaas Cobb
777 High Street, Suite 300
Eugene, Oregon 97405

Of Attorneys for Amici Curiae
Associated Oregon Industries, ,
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Oregonians for Food & Shelter, Oregon
Forest Industries Council, Oregon
Metals Industries Council, and Oregon
Restaurant Association

AMICUS CURIAE BRIEF

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Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(*Counsel of Record*)
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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QUESTION PRESENTED

Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose – for the first time in the litigation – a state-law procedural bar that is neither firmly established nor regularly followed.

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BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of petitioner because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decision in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (2007) ("*Williams II*"), which appropriately recognized that the Due Process Clause forbids punishing defendants for harm sustained by those not party to the litigation. Yet a number of courts have

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel has made such a monetary contribution.

resisted the principles set forth in *Williams II* and its antecedents. The decision of the Oregon Supreme Court on remand from this Court's decision in *Williams II* illustrates the problem. The Oregon court sidestepped this Court's mandate to apply the constitutional standard set forth in *Williams II* by interposing a novel state procedural bar to affirm the judgment against petitioner "without reaching the federal question." Pet. App. 13a. A number of other state courts have employed similar devices to avoid applying this Court's punitive damages precedents. The Chamber submits that by reversing the Oregon Supreme Court's decision below this Court would signal that it will not tolerate resistance to administering punitive damages awards according to the constitutional requirements identified in this Court's decisions.

Because the Chamber's members appear repeatedly before this Court and lower courts at both the state and federal levels, the Chamber also has a significant interest in the predictability afforded when lower courts hew faithfully to this Court's precedents and reach the merits of federal claims fairly presented. In practical effect, lower courts are the primary guardians of federal rights; disparate regard for the scope of those rights results in dramatically disparate rulings, including wildly varying punitive damages awards. A decision by this Court reaffirming *Williams II* would do much to secure the important due process rights protected by that decision in federal and state courts nationwide.

The Chamber therefore respectfully submits this brief urging the Court to reverse the decision below and thereby ensure the integrity of this Court's mandate in *Williams II*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented in this case – whether a lower court may, for the first time on remand, invent a state procedural obstacle to avoid applying federal constitutional law as mandated by this Court – has obvious implications for the institutional authority of this Court. But it has broader implications as well. American businesses rely on the predictability of legal rules enunciated by this Court and other reviewing tribunals – a predictability severely undermined when lower courts depart from this Court's rulings and the principles they set forth. The concern is all the more substantial when the issue involves punitive damages, which already suffer the "real problem" of "stark unpredictability." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008); *see Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (Kennedy, J., concurring); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

And yet it is the subject of punitive damages that seems to have engendered particular resistance among lower courts to this Court's rulings. The Oregon Supreme Court's effort to avoid *Williams II* in this case exemplifies this unfortunate pattern, which is also reflected in other courts' treatment of not only *Williams II* but also *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Both cases erected important substantive and procedural bulwarks against the "remarkable" variance in punitive verdicts, *Exxon Shipping*, 128 S. Ct. at 2625 – a variance fundamentally contrary to our basic conception of law, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J. concurring) ("Requiring the application of law, rather than a de-

cisionmaker's caprice . . . helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself."), and to the conception of just punishment our law embodies, *see Exxon Shipping*, 128 S. Ct. at 2627 ("[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another. And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage." (citation omitted)). But such bulwarks are only as effective as the respect they are accorded by the lower courts that apply them. And when lower courts refuse to apply them seriously – or, worse, when courts circumvent them through dubious procedural devices – the principles this Court has enunciated cannot serve their objective of mitigating lawless variability in punitive damages verdicts. If the Oregon Supreme Court's decision here is affirmed, other courts will be encouraged to find similarly novel ways to avoid *Williams II* and *State Farm*, as some already have. To ensure respect for this Court and for the important principles of law it has set forth – not only on the subject of punitive damages, but also on any other subject – the judgment below must be reversed.

ARGUMENT

I. State Courts Are Not Consistently Applying *Williams II*

This Court's decision in *Williams II* provided U.S. businesses and other litigants an important measure of protection against global punishment in individual

cases and the concomitant risk of multiplicative remedies. In holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties," the decision reaffirmed the bedrock principle that defendants cannot be punished without first receiving "'an opportunity to present every available defense.'" *Williams II*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56 (1972)). But *Williams II* has not received a uniformly warm reception in the lower courts. No case illustrates the point better than the Oregon Supreme Court's own treatment of *Williams II* itself on remand.

When this Court remands a case to a state or lower federal court for further proceedings, that court cannot "go back of, or subvert, what was settled by the opinion and mandate in the present case[]." *Gaines v. Rugg*, 148 U.S. 228, 244 (1893); *see also Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948) (a court of appeals "has no power or authority to deviate from the mandate issued by" this Court). The court may not "reconsider questions which the mandate has laid at rest," *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940), and it may not "give any other or further relief . . . than to settle so much as has been remanded," *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Requiring lower courts to comply with the directives issued by this Court ensures that this Court's decisions are predictably applied and that litigants are able to rely on those decisions as issued.

This Court's mandate in *Williams II* was clear. The outstanding issue in the case when it arrived in this Court was whether "Oregon had *unconstitution-*

ally permitted [petitioner] to be punished for harming nonparty victims." 127 S. Ct. at 1062 (emphasis added). And having decided that "the Oregon Supreme Court applied the wrong constitutional standard" – thereby allowing such impermissible punishment – this Court remanded the case "so that the [state court could] apply the standard" set forth in *Williams II*: a jury may not "use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064, 1065.

But the Oregon court did not reach, much less "apply," this Court's standard. Instead, it invoked an "independent state law" rule under which it affirmed the judgment against petitioner "without reaching the federal question." Pet. App. 13a. As petitioner's brief explains, that was error.

But it was, unfortunately, not an entirely isolated error. In the eighteen months since *Williams II* was decided, a number of state courts also have failed to give full and faithful effect to the decision, even when directly ordered by this Court to reconsider an opinion in light of the case.

One stark example is *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 290 (Cal. Ct. App.), *modified on other grounds and reh'g denied*, 2008 Cal. App. LEXIS 515 (Cal. Ct. App.), *review granted*, 2008 Cal. LEXIS 8246 (Cal. 2008). On remand from this Court in light of *Williams II*, *see Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007), the California Court of Appeal concluded that *Williams II* "d[id] not require that [it] change any of the holdings in its original opinion." 73 Cal. Rptr. 3d at 290. Like the Oregon Supreme Court, the California court in

Buell-Wilson concluded that the defendant did not properly preserve its argument against punishment for nonparty harm under state law and thus had forfeited it. The court in *Buell-Wilson* went further, however, and determined that *Williams II* was inapplicable because "there was no evidence or argument at trial that created a significant risk that the jury, in deciding the amount of punitive damages to award, punished [the defendant] for harm it caused to third parties." *Id.*

That conclusion is inexplicable. The California Court of Appeal itself recognized that plaintiffs had introduced evidence of the defendant's "reckless disregard for the safety of others," the "repeated nature of [the defendant's] conduct," and "serious injuries to [drivers of the] Bronco II," even though that was not the type of vehicle driven by the plaintiff. *Id.* at 312, 319. It further recognized that plaintiff's counsel had reminded the jurors during closing argument that they "ha[d] heard of others in California" who had been hurt, that defendant "had had the same problem before," and that defendant "chose to put people in wheelchairs, brain damaged or death" through its "[w]illful disregard of the health and safety of [plaintiff] and those like her." *Id.* at 341-42. If that evidence and argument does not pose a "significant" or "unreasonable and unnecessary risk" that a defendant will be punished for harm caused to nonparties, *Williams II*, 127 S. Ct. at 1065, it is difficult to imagine in what circumstances the California court would conclude that *Williams II* does apply.[2]

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[2] Remarkably, the *Buell-Wilson* court rendered its decision days after a separate panel of the California Court of Appeal recognized that *Williams II* and *State Farm* compelled *reversal* of a punitive damages award potentially traceable to harm to

The analysis of the Louisiana Court of Appeal in *Grefer v. Alpha Technical*, 965 So. 2d 511 (La. Ct. App. 2007), *cert. denied*, 128 S. Ct. 2054 (2008), reflects a similar unwillingness to fairly implement this Court's decision. On remand from this Court in light of *Williams II*, *see Exxon Mobil Corp. v. Grefer*, 127 S. Ct. 1371 (2007), the Court of Appeal declared that it would "stand by [its] initial decree" affirming an award of $112 million in punitive damages in a case involving the contamination of land with radioactive waste. 965 So. 2d at 526. The plaintiffs' only claim was for property damage; they did not live or work on the property and were not exposed to the contamination. *Id.* Yet plaintiffs' counsel urged the jury to award punitive damages based on health risks that the contamination of their property allegedly posed to the public and to employees who cleaned pipes on plaintiffs' land – individuals who could, *and did*, bring their own lawsuits against the defendants. *See infra* at 17. And the jury instructions, to which the defendants repeatedly objected, allowed the jury to award punitive damages based solely on harm to the public. *See* 965 So.2d at 516-17 ("[Y]ou may award exemplary damages against a defendant when the plaintiff shows that the defendants were wanton or reckless in their disregard for public safety.").

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nonparty victims. *See Holdgrafer v. Unocal Corp.*, 73 Cal. Rptr. 3d 216, 238-39 (Cal. Ct. App. 2008). The Supreme Court of California has since granted the defendant's petition for review in *Buell-Wilson* and deferred briefing pending this Court's consideration of this case. *See* 2008 Cal. LEXIS 8246 (Cal. 2008). This Court's disposition of this case thus will have considerable import for the treatment of *Williams II* in the State of California.

After the remand from this Court, the Louisiana Court of Appeal affirmed those instructions as "both permissible and constitutional," 965 So. 2d at 517, even though they allowed precisely the direct punishment for nonparty harm denounced in *Williams II*. *See* 127 S. Ct. at 1063. And in its independent review of the constitutionality of the punitive damages award, the Court of Appeal justified the award on the ground that the defendant, upon recognizing the possibility of contamination, *stopped* sending contaminated pipes to plaintiffs' land, because the court believed that decision put a *third*, "financially vulnerable" party out of business. *Grefer*, 965 So. 2d at 522. The court purported to analyze that third-party harm under the guise of "reprehensibility," but not only did the court effectively punish the defendants directly for the nonparty harm, it also failed to understand that only when the *same* "conduct that harmed the plaintiff also posed a substantial risk of harm to the general public" can nonparty harm be used to show reprehensibility. *Williams II*, 127 S. Ct. at 1064. The court's consideration of nonparty harm flowing from *different* conduct was flatly inconsistent with *Williams II*.

The Supreme Court of Appeals of West Virginia has ignored the dictates of *Williams II* as well. In *State ex rel. Chemtall Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), *cert. denied*, 128 S. Ct. 1748 (2008), the court affirmed as facially consistent with *Williams II* a lower court's decision to have a trial, before the plaintiff class was certified, on "whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier." 655 S.E.2d at 164-65. As the *Chemtall* dis-

sent objected, however, a court that determines punitive damages before it determines the set of plaintiffs involved certainly contravenes the holding of *Williams II*. A defendant cannot possibly present "every available defense" to the charges against it when the defendant does not know who is making the charges or the number of charges being brought. *Id.* at 170 (Benjamin, J., dissenting in part); *see also Amicus Curiae* Br. of the Chamber et al. in Support of Petitioners, *Chemtall, Inc. v. Madden*, No. 33380, at 7-9 (Aug. 13, 2007) (arguing the same); *Amicus Curiae* Br. of the Chamber in Support of Petitioner, *Philip Morris USA Inc. v. Accord*, No. 07-806, at 2-3 (Jan. 16, 2008) (describing West Virginia Supreme Court of Appeals' approval of similar procedure in another case).

As these cases demonstrate, the continuing vitality of *Williams II* is far from secure. And this case could mean almost as much for the effect of *Williams II* as *Williams II* itself. Many lower courts will be watching this case not only for signals as to this Court's adherence to *Williams II*, but also for signals as to the latitude they may have to distinguish away or otherwise circumvent the decision. By disapproving the Oregon court's evasion of this Court's prohibition against punishment for nonparty harm, this Court can forcefully reject past efforts to evade *Williams II*, prevent future courts from following the same unlawful course, and reinforce a level of predictability in the application of its mandate that will benefit all litigants.

II. Lower Courts Are Also Failing To Apply *State Farm* Faithfully

The experience following this Court's decision in *State Farm* confirms that reversal of the Oregon court's decision is necessary here. Even before courts began evading the principle of *Williams II* as described above, a number of state courts were rejecting the holding and analysis of this Court's decision in *State Farm*. The subsequent history of that case provides a troubling glimpse into the likely future of *Williams II*, should the Oregon Supreme Court's failure to follow this Court's instructions go unchecked.

In *State Farm* this Court provided detailed guidance to state and lower federal courts on how to review punitive damages awards to ensure that they are not excessive and that defendants have fair notice of the potential awards to which they might be subject. The Court elaborated on each of three guideposts that it had previously instructed reviewing courts to consider: (1) the reprehensibility of the defendant's misconduct; (2) the ratio of punitive damages to harm suffered by the plaintiff; and (3) the civil penalties authorized or imposed in comparable cases. *See* 538 U.S. at 418. With respect to ratio, the Court instructed that, "[w]hen compensatory damages are substantial," an award "equal to compensatory damages" will often "reach the outermost limit of the due process guarantee." *Id.* at 425. The Court then concluded that applying "the *Gore* guideposts to the facts of [*State Farm* itself] . . . likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

The significance of that ruling was underscored

just last term in *Exxon Shipping*, which adopted a 1:1 ratio as a mandatory cap on punitive damages in certain federal maritime cases, noting in the process that the same ratio might have been required in that particular case as a matter of due process as well. 128 S. Ct. at 2633-34 & n.28.

Despite the importance of the ratio principle described in *State Farm* and later applied in *Exxon Shipping*, the Utah Supreme Court on remand in *State Farm* held that due process permitted a punitive award *nine times* the size of the compensatory damages awarded. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 410-11 (Utah 2004). The court explicitly reasoned that *this Court had erred* in concluding that the compensatory award for emotional distress already contained a punitive element and decided instead that the damages for emotional distress actually justified a higher punitive award because conduct that causes emotional harm is "markedly more egregious" than conduct that causes economic harm. *Id.* at 418; *see id.* at 413. That reasoning turned the guidance provided by this Court in *State Farm* on its head.

Unfortunately, a number of courts have followed the Utah court's lead, ignoring this Court's ruling and sanctioning punitive awards with ever higher ratios where there were undeniably "substantial" compensatory damages. For example, in *Seltzer v. Morton*, 154 P.3d 561, 611-612 & n.32 (Mont. 2007), the court cited the Utah Supreme Court's decision on remand, and this Court's subsequent denial of State Farm's petition for certiorari, to justify a ratio of over 18:1 based on $1.1 million in compensatory damages for abuse of process and malicious prosecution. Similarly, in *Goddard v. Farmers Insurance*

Co. of Oregon, 120 P.3d 1260, 1281 & n.24, 1284 (Or. Ct. App. 2005), the court decided upon a 3:1 ratio after noting the 9:1 ratio on remand in *State Farm* and the denial of certiorari. The Oregon Supreme Court subsequently deemed the ratio too low, even though the case involved $1.28 million in compensatory damages, and increased it to 4:1. *See Goddard v. Farmers Ins. Co. of Oregon*, 179 P.3d 645, 670 (Or. 2008). And the Oregon Supreme Court in this very case affirmed a punitive damages award of *97 times* the amount of the compensatory damages – a ratio with no basis in any precedent of this Court. *See* Pet. 31-34; *see also, e.g., Flax v. DaimlerChrysler Corp.*, 2008 Tenn. LEXIS 505 (Tenn. 2008) (5.35:1 ratio based on $2.5 million compensatory verdict); *Gibson v. Moskowitz*, 523 F.3d 657 (6th Cir. 2008) (2:1 ratio based on $1.5 million compensatory verdict); *Union Pac. R.R. v. Barber*, 149 S.W.3d 325 (Ark. 2004) (4.9:1 ratio based on $5.1 million compensatory verdict); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004) (6:1 ratio based on $1.5 million compensatory verdict), *cert. denied*, 544 U.S. 920 (2005); *Bocci v. Key Pharms., Inc.*, 79 P.3d 908 (Or. Ct. App. 2003) (7:1 ratio based on $5.5 million in compensatory damages).

Justices of the West Virginia Supreme Court of Appeals have expressed open hostility toward *State Farm*'s important pronouncement concerning permissible ratios,[3] and that court has refused to in-

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[3] *See, e.g., Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 367 (W. Va. 2004) (McGraw, J., concurring) (opining that in *State Farm*, "the majority of the nine justices did not focus on 'the degree of reprehensibility of the defendant's conduct,' but instead chose to substitute the jury's judgment with their own." (citation omitted)); *see also id.* at 366 (May-

struct a trial court on remand that "single-digit multipliers are more likely to comport with due process" or even that, to be probative, out-of-state lawful conduct "must have a nexus to the specific harm suffered by the plaintiff." *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 364-65 (W. Va. 2004) (Maynard, C.J., concurring in part and dissenting in part). And on the Louisiana Court of Appeal, at least one judge is of the opinion that the constitutionality of a punitive damages award should depend on whether "the defendant is an individual rather than a corporation," *Byous v. Ebanks*, 983 So. 2d 1033, 2008 La. App. Unpub. LEXIS 282, at *27 (La. Ct. App. 2008) (Murray, J., concurring with reasons), a factor completely *outside* the *State Farm* analysis, and one that expressly reflects improper "bias[] against big businesses," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

Some courts have also evaded the holding of *State Farm* by interposing unjustifiable procedural bars, like the Oregon court did to avoid applying *Williams II* here. In *Prendergast v. Craft*, 2008 Ark. App. LEXIS 402 (Ark. Ct. App. 2008), for example, the Arkansas Court of Appeals decided that the defendant had "set[] out some of the elements" of a due

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nard, C.J., concurring in part and dissenting in part) ("I fervently hope that the next time a punitive damages award is reviewed by this Court, the majority will abide by the United States Supreme Court's decision in *Campbell*, even if it does not like or agree with *Campbell*'s holdings. . . . *Campbell* is the law of the land, and it must be applied everywhere in the United States, including in West Virginia."); *In re Tobacco Litig.*, 624 S.E.2d 738, 749 (W. Va. 2005) (Starcher, J., concurring) ("As the members of this Court have noted before, *State Farm v. Campbell* . . . was nothing more than a summary, a collation, of prior case law." (citing cases)).

process challenge to the punitive damages award, but had not "specifically ma[de]" a constitutional argument and thus had failed to preserve it. *Id.* at *14. That conclusion was "indefensible," *id.* at *20 (Hart, J., dissenting), since the defendant had made an argument that was expressly based on the *State Farm* factors, *id.* at *21. As Judge Hart explained in her dissent, the majority had "excused itself from analyzing the reprehensibility of [the defendant's] conduct in the exact way that [the defendant] argued this point to the trial court and . . . on appeal." *Id.* at *22. The majority's dodge of *State Farm* further illustrates the hostility of some courts to that decision.

State Farm is hardly an opaque decision; other courts have had no difficulty understanding that it does not permit grossly disproportionate punitive damages awards. *See, e.g., Sec. Title Agency, Inc. v. Pope*, 2008 Ariz. App. LEXIS 118, at *72 (Ariz. Ct. App. 2008) (citing *State Farm* in reducing punitive damages award from $35 million to $6.1 million, the amount of compensatory damages); *Sun Pac. Farming Coop., Inc. v. Sun World Int'l, Inc.*, 2008 U.S. App. LEXIS 10345, at *4-*5 (9th Cir. 2008) (citing *State Farm* in vacating punitive damages award with 31:1 ratio); *Barnes v. Univ. Hosps. of Cleveland*, 2008 Ohio LEXIS 1776, at *21-*22 (Ohio 2008) (reversing punitive damages award and remanding for consideration in light of *State Farm*); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007) (citing *State Farm* and ordering district court to impose ratio between 1:1 and 2:1 because "a substantial compensatory damages award means that a lower ratio is needed to satisfy the requirements of due process"), *petition for cert. filed*, No. 07-1438 (U.S. May 19, 2008); *Williams v. Con-*

Agra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004) (quoting *State Farm* and "[a]ccordingly" reducing punitive damages to amount of compensatory damages); *see also Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235 (3d Cir. 2005) (affirming award that "result[ed] in approximately a 1:1 ratio, which is indicative of constitutionality under *Gore* and *Campbell*"). *State Farm* is hardly a dead letter, in other words, but the continuing strength of its message depends on whether lower courts respect their obligation to adhere to it.

When *State Farm* was decided, it was hailed as a watershed decision that promised at last to bring some order and rationality to judicial review of punitive damages awards.[4] That initial promise becomes increasingly undermined, however, the more that lower courts are allowed to ignore or evade its principles. Reversal of the decision below will make clear to all courts that efforts to evade this Court's punitive damages decisions will not be countenanced.

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[4] *See, e.g.*, David G. Savage, *Justices Act to Restrict Punitive Damage Awards: The Supreme Court Ruling Is a Move to Control "Irrational and Arbitrary" Verdicts*, L.A. Times, Apr. 8, 2003, at 1 ("The . . . ruling sends a stern warning to state judges and juries to rein in excessive awards."); Editorial, *Punitive Damages on Trial*, Chi. Trib., Apr. 12, 2003, at C26 ("The high court drew some badly needed guidelines on what is reasonable when the courts award punitive damages in civil cases."); Lorraine Woellert & Mike France, *Tort Reform Has Friends in High Places*, Bus. Wk., Apr. 21, 2003, at 78 (arguing that "[t]he ruling should inject a level of predictability into high-stakes litigation").

III. Failure To Reaffirm The Procedural Protections Of *Williams II* Will Have Significant Adverse Consequences For Defendants In Punitive Damages Cases

A reversal of the judgment below is also necessary because of the importance of the *Williams II* decision to the fair administration of punitive damages procedures in the lower courts. Absent the protection extended by *Williams II*, defendants are subject to multiple punishments for causing the same harm. This Court explained as early as *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis" because "in the usual case nonparties are not bound by the judgment some other plaintiff obtains" and "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct." 538 U.S. at 423. The decisions that refuse to apply *Williams II* make concrete the risk of multiple punishment. In *Grefer*, for example, the trial court instructed the jury that it could award punitive damages based upon risk to the public health, and the court of appeal relied upon the harm to a third-party contractor and employees to justify the award. Yet those employees and members of the public had already filed their own suits against the defendant, seeking their own damages for the claimed health effects of the alleged contamination. *See, e.g.*, *In re Harvey TERM Litig.*, No. 01-8708 (La. Dist. Ct. Parish of Orleans, Div. D); *Warner v. ExxonMobil Corp.*, No. 02-19657 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 18, 2005); *see also Rinehart v. Shelter Gen. Ins. Co.*, 2008 Mo. App. LEXIS 942

(Mo. Ct. App. 2008) (allowing consideration of a separate $23 million verdict against the defendant in assessing punitive damages).

In addition to the serious risk of double punishment, the state courts' failure to follow *Williams II* violates the very essence of due process: the right to be heard before a judgment may be entered for or against a party. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). A lower court that does not protect against the possibility of punishment for nonparty harm effectively turns the individual case into a *de facto* class action, without the *de jure* procedural protections deemed essential to the fair deployment of the class action device. *See, e.g.*, Pet. App. 55a (referring to the "broader *class* of Oregonians" addressed by the litigation (emphasis added)).

The due process risk inherent in such a proceeding is self-evident: if the class representative's claim is not typical of the other claims or if the class members' claims differ materially among themselves, proceeding on a representative basis will almost certainly deny the defendant its right to mount a full and fair defense against each individual claim. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *see also Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."). For example, the defendants in *Buell-Wilson* could

not prove that the ostensibly injured nonparties who had driven the Bronco II or had suffered accidents similar to that of the plaintiff would be unable "to establish specific elements" of their claims "or that the defendant [itself could have] establish[ed] unique affirmative defense[s]" to those claims. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 601 (2003). And the defendants in *Chemtall* could not even begin to attack plaintiffs' claims against them because they did not know who the plaintiffs would be. *Chemtall*, 655 S.E.2d at 164.

In short, the Court's decision in *Williams II* is of critical importance in protecting against arbitrary punitive damages awards, and the lower courts' failure to follow the procedural requirements of the decision severely dilutes that protection. In order to ensure the continued force of the safeguards provided by *Williams II*, and to make clear that this Court's decisions must be followed by lower courts, this Court should reverse the decision of the Oregon Supreme Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the decision below should be reversed.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JONATHAN D. HACKER
(*Counsel of Record*)
IRVING L. GORNSTEIN
MEAGHAN MCLAINE
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Attorneys for Amicus Curiae

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IN THE

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PHILIP MORRIS USA,

Petitioner,

vs.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

KENT S. SCHEIDEGGER
Counsel of Record
LAUREN ALTDOERFFER
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
(916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

108525 A 33

QUESTION PRESENTED

Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

vs.

MAYOLA WILLIAMS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. The parties have consented to the filing of this brief.

   No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

The issue of a procedural default rule as an adequate and independent ground of a state-court judgment arises in the context of habeas corpus review of criminal judgments by the lower federal courts as well as in the context of this Court's direct review of state judgments on certiorari. With a few exceptions, the same rules apply in both contexts. The manner in which this Court resolves the present case could have a significant impact on the finality of criminal judgments and therefore on the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

This smoking liability case is before this Court for the third time. The jury found that Philip Morris had engaged in deceit, and it awarded the estate of Jesse Williams, who had died from illness caused by smoking, $821,000 in compensatory damages and $79.5 million in punitive damages. See *Philip Morris USA* v. *Williams*, 549 U. S. 346, 127 S. Ct. 1057, 1060-1061 (2007).

After review in the state courts, the case was remanded by this Court in light of *State Farm Mut. Automobile Ins. Co.* v. *Campbell*, 538 U. S. 408 (2003). See *Philip Morris USA, Inc.* v. *Williams*, 540 U. S. 801 (2003). In the Oregon Supreme Court, Philip Morris argued that the jury instructions permitted the jury to punish it for harm to persons other than the plaintiff's decedent and that the trial court erred in rejecting its proposed instruction precluding such punishment. See 127 S. Ct., at 1064.

The Oregon Supreme Court rejected this claim on the merits. See *id.*, at 1064-1065. This Court vacated and remanded, holding "that the Oregon Supreme Court applied the wrong constitutional standard . . . . We remand this case so that the Oregon Supreme Court can apply the standard we have set forth." *Id.*, at 1065.

On remand, plaintiff contended that defendant's proposed jury instruction "was erroneous in a number of ways that are unrelated to the issues addressed by the United States Supreme Court," and the Oregon Supreme Court agreed. *Williams* v. *Philip Morris, Inc.*, 344 Ore. 45, 57, 176 P. 3d 1255, 1261 (2008). The state court found that because of these unrelated errors of state law in the proposed instruction, "the trial court did not err in refusing to give it. Our previous conclusion to that effect is reaffirmed." *Id.*, at 61, 176 P. 3d, at 1263. This Court granted certiorari on June 9, 2008.

SUMMARY OF ARGUMENT

This Court has used a variety of phrases over many years to describe when a state ground is "adequate" or "inadequate" to preclude federal court review of an issue. These phrases form a haphazard patchwork that has drawn considerable scholarly criticism. A coherent formulation, which takes into account the underlying policies and is consistent with the results of nearly all the precedents, is both desirable and possible.

The correct rule, *amicus* submits, is one along the lines proposed by the late Professor Charles Alan Wright, et al. That is, the claimant should have notice that the rule exists and applies to his situation and should have a reasonable opportunity to present his federal claim. See 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, pp. 386-387, 392 (2d ed. 1996).

This formulation would give the states the proper latitude to form and enforce their own consistent set of procedural rules for the presentation of all claims, state and federal. At the same time, it would enable the federal courts to step in when state rules are manipulated to evade federal law, to discriminate against

federal rights, or to facilitate invidious discrimination against disfavored groups.

Implications from previous cases that state rules must be "strict" or that they cannot be "discretionary" should be expressly repudiated. These statements create perverse incentives for states to create harsh regimes of rigid procedural defaults and to discourage needed exceptions when justice requires them.

This formulation is consistent with the results of all the major precedents except *Henry* v. *Mississippi*. That case was wrongly decided at the time, and it was also based on since-overruled precedent. *Henry* has little value as precedent and should not prevent the formulation of a coherent standard.

ARGUMENT

I. The "regularly followed" requirement has been routinely misused in the Ninth Circuit to sweep aside fair, necessary, and well-established state procedural rules.

In Part II, *infra*, we describe how the "inadequate state ground" doctrine relied on by petitioner is a confused, haphazard collection of ranging rubrics. This confused state of the law might not matter so much if it only applied to this Court's direct review of state court judgments, as in the present case, because we could be confident that the doctrine would be applied fairly and sensibly in practice, however lacking it may be in precision.

Regrettably, that is not the case. The doctrine applies equally to habeas review of state court criminal judgments in the lower federal courts. See *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). In the hands of a panel that is hostile to a state's law, such as capital

punishment or "three strikes," and looking for a way to reach defaulted claims, the "regularly followed" rubric is a dangerous weapon for effectively nullifying perfectly valid state rules. That is precisely what has happened in the Ninth Circuit.

Standard practice throughout the United States requires that claims based on the trial record be made on the direct appeal. With some exceptions, such claims are defaulted if they are raised for the first time on collateral review, and they will generally be rejected on that basis. See *Sanchez-Llamas* v. *Oregon*, 548 U. S. 331, 351 (2006). California follows this rule. It was plainly stated in a decision of the state's highest court over half a century ago, see *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953), and the rule was already well established by that time. See *In re Connor*, 16 Cal. 2d 701, 705, 108 P. 2d 10, 13 (1940).

Rigid application of procedural rules can produce unjust results, and so most rules have exceptions. It is common for these exceptions to evolve and be clarified over time. The "cause and prejudice" test for federal collateral review was not fully formed until the comparatively late date of 1982, see *United States* v. *Frady*, 456 U. S. 152, 167-168, and the categorical exception of ineffective assistance claims from the raise-on-appeal rule was not settled until five years ago. See *Massaro* v. *United States*, 538 U. S. 500, 504 (2003).

In California, the *Dixon* rule contained an exception for "special circumstances constituting an excuse for failure" to raise the issue on direct appeal, 41 Cal. 2d, at 759, 264 P. 2d, at 514-515, with the boundaries of that exception left for further development. Lack of precision in the circumstances for excuse of a default does not constitute a "springe" that is unfair to the party making the claim, cf. *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923), so long as the rule itself is clear and

feasible. If the law of the state clearly tells the parties, "Make claim A via procedure X or else you *may* not be allowed to make it later," there is nothing inherently unfair about relief from default being handled on a discretionary, case-by-case basis.

This is all just common sense, but the Ninth Circuit is oblivious to it. Instead, the "regularly followed" requirement for "adequacy" of a state ground is applied with "pointless severity," cf. *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), in a manner that "serves no perceivable [federal] interest." Cf. *Osborne* v. *Ohio*, 495 U. S. 103, 124 (1990).

In 1979, Stevie Lamar Fields perpetrated a "one-man crime wave," committing numerous acts of rape, robbery, forcible oral copulation, assault with a deadly weapon, kidnapping, and murder against five victims. See *People* v. *Fields*, 35 Cal. 3d 329, 336, 673 P. 2d 680, 683 (1983). The State of California provided him with a direct appeal for his claims on the trial record and a habeas proceeding for claims requiring additional facts. See *In re Fields*, 51 Cal. 3d 1063, 800 P. 2d 862 (1990). When he came back for a third bite at the apple, the state high court invoked the long-established *Dixon* rule. See *Fields* v. *Calderon*, 125 F. 3d 757, 760 (CA9 1997).

"Normally, . . . such rules constitute an adequate and independent state-law ground preventing [a federal court] from reviewing the federal claim." *Sanchez-Llamas*, 548 U. S., at 351. Not in the Ninth Circuit. Even though the rule was clear, its applicability was clear, and compliance was readily available, the Ninth Circuit branded the rule "inadequate" because the California Supreme Court subsequently felt the need to clarify and crystalize the exceptions to the rule and the circumstances under which relief from default would be granted. See *Fields*, 125 F. 3d, at 762-763.

Instead of being narrowed to the claims properly presented to the state courts, the case was sent back to the district court for consideration of the defaulted claims as well, see *id.*, at 765, and another decade of litigation followed. A case that should have been over many years ago only became final this year. See *Fields* v. *Ayers*, 128 S. Ct. 1875 (2008) (denial of cert.).

The Ninth Circuit's pointless insistence on regularity of application, detached from the purpose of the adequacy rule, continues to this day. In *Bennett* v. *Mueller*, 322 F. 3d 573, 585-586 (CA9 2003), the Ninth Circuit remanded a case to the district court for a new round of litigation to determine if the state courts "regularly" enforce their rule, even though there had been no showing that the defendant had insufficient notice or opportunity to comply or that state rules had been applied in a discriminatory manner. Such remands are routine. See, *e.g.*, *McKinney* v. *Kane*, No. 05-56830, 2008 U. S. App. Lexis 10952 (CA9, May 16, 2008) (unpublished) (requiring further litigation of claim of instructional error raised for the first time on the *fourth* state habeas petition). Although the Ninth Circuit has created this morass of pointless litigation, this Court's confused jurisprudence on adequate state grounds has made it possible. The present case provides an opportunity to bring clarity to this area.

II. "Reasonable opportunity" should be adopted as the test of adequate state procedural grounds, and the prior patchwork of confusing phrases discarded.

A. "An Untidy Area."

Justice Frankfurter once referred to habeas corpus as "an untidy area of our law that calls for much more systematic consideration than it has thus far received." *Sunal* v. *Large*, 332 U. S. 174, 184 (1947) (dissenting opinion). The same could be said today of the "adequate and independent state grounds" doctrine.

The problem of adequate and independent state grounds is common to state-prisoner habeas cases under 28 U. S. C. § 2254 and this Court's direct review of state judgments under 28 U. S. C. § 1257. See *Lee* v. *Kemna*, 534 U. S. 362, 375 (2002). Most of this Court's precedents on the subject are in the latter category. These precedents span the entire twentieth century, and they form a haphazard patchwork, offering "Varying Rubrics" for defining inadequacy. See R. Fallon, D. Meltzer, & D. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 557 (5th ed. 2003) (cited below as "Hart & Wechsler"). The phrases offered up include "without any fair or substantial support," *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 22 (1920), "arid ritual of meaningless form," *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the defendant "could not fairly be deemed to have been apprised of [the rule's] existence," *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958), a rule not previously applied "with the pointless severity" of the present case, *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964), "impos[ing] unnecessary burdens upon [federal] rights," *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294, 298 (1949), "more properly deemed discretionary than jurisdictional," *Sullivan* v. *Little*

Hunting Park, Inc., 396 U. S. 229, 234 (1969), "not strictly or regularly followed," *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964), and finally, whether "the practice gives to the litigant a reasonable opportunity to have the issue as to the claimed right heard and determined by [the state] court." *Central Union Tel. Co.* v. *Edwardsville*, 269 U. S. 190, 194-195 (1925); *Parker* v. *Illinois*, 333 U. S. 571, 574 (1948) (quoting and following *Central Union*).

One scholar surveying the varying formulations declared that "the governing rules may be discerned less in what the Court has been saying than in what it has been doing." Hill, The Inadequate State Ground, 65 Colum. L. Rev. 943, 944 (1965). More than once, the Court has used broad language to declare a state ground inadequate and then refused to review a claim in a later case that would seem to come within that language, never explaining the apparent inconsistency.

Davis v. *Wechsler*, 263 U. S. 22, 23 (1923), involved a jurisdictional objection based on an executive order implementing a federal statute. The objection was rejected by the state court on the ground that the objecting party had waived it by entering a general appearance, even though the pleading making the appearance clearly stated the objection. *Id.*, at 24. Justice Holmes, in often-quoted language, rejected the contention that this ground blocked Supreme Court review. "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Ibid.*

This statement seems to imply a sweeping authority to disregard state procedural defaults, so long as the objection is "plainly and reasonably made." The appellant in *Central Union*, *supra*, thought so. It had

forfeited its constitutional claims, under well-established Illinois rules, by taking its appeal to the intermediate appellate court rather than the Illinois Supreme Court. 269 U. S., at 193-194. There was nothing unplain or unreasonable about its statement of its claims. Yet the Court held that the state procedural default ground was adequate, stating the "reasonable opportunity" standard quoted *supra*, at 9. The two cases were decided only two years apart. Both were unanimous. Eight Justices participated in both cases, including the authors of both opinions. Yet there is no explanation of why a claim that seems to come within the language of *Davis* was rejected in *Central Union*.

Henry v. *Mississippi*, 379 U. S. 443, 447 (1965), seemed to say that the test was whether the state rule served a "legitimate state interest."[2] In *Monger* v. *Florida*, 405 U. S. 958 (1972) (*per curiam*), the defendant's claim had been barred by one of the rare procedural rules that appears to lack a legitimate interest. He had filed his notice of appeal too early, before formal entry of judgment, and did not renew it afterward. *Id.*, at 958-959 (Douglas, J., dissenting). The dissent quoted *Henry* to no avail. *Id.*, at 961-962. The Court's summary order merely states the claim is barred. See *id.*, at 958; see also Hart & Wechsler, *supra*, at 561, and n. 12 (citing *Monger* for the proposition that "for the most part Henry has been ignored in subsequent

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2. We hedge with "seemed," because the *Henry* opinion is universally considered unclear. See Hart & Wechsler, *supra*, at 561 ("confusing"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4020, p. 288 (2d ed. 1996) ("surprisingly ambiguous"); Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 196, n. 39 ("puzzling"); Hill, *supra*, 65 Colum. L. Rev., at 984, n. 173 ("confusing"); *id.*, at 986, n. 174 ("unclear").

cases"); 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4028, pp. 396-397 (2d ed. 1996); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice § 3.26, pp. 213-214 (8th ed. 2002) (comparing *Henry* with *Wainwright* v. *Sykes*, 433 U. S. 72 (1977)).

At times, the standard seems to appear out of nowhere. In *Henry*, *supra*, the Court declared that its "legitimate state interest" standard was based on settled law, 379 U. S., at 447, but this assertion is simply false. See Hill, 65 Colum. L. Rev., at 988; Wright, Miller, & Cooper, *supra*, § 4020, at 289 (cases cited do not support this statement); Glennon, The Jurisdictional Legacy of the Civil Rights Movement, 61 Tenn. L. Rev. 869, 899 (1994) ("remarkable remake of the . . . doctrine"). Similarly, *Barr* v. *City of Columbia*, 378 U. S., at 149, claimed that its "strictly or regularly followed" standard reflected established precedent. This is an overstatement, to put it mildly, see Hill, *supra*, at 962, n. 71, unsupported by the earlier cases. *Barr* cites four cases for this proposition, yet the word "strictly," which has been the source of much mischief since *Barr*, does not appear in the statement of the rule in any of the four. *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 457, sets forth the novelty/fair notice standard. *Wright* v. *Georgia*, 373 U. S. 284, 291 (1963), and *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 301 (1964) (*per curiam*), quote *Patterson*. *Shuttlesworth* v. *Birmingham*, 376 U. S. 339 (1964), is a summary reversal citing *Williams* v. *Georgia*, 349 U. S. 375 (1955), but not otherwise stating a test. *Williams* was a case of discriminatory use of a discretionary power, such that "the state court action in the particular circumstances is, in effect, an avoidance of the federal right." *Id.*, at 383 (footnote omitted). The "strictly" requirement in *Barr* was a bolt from the blue, and, as

discussed *infra*, at 17, one that can cause perverse results if taken literally.

In *Walker* v. *Birmingham*, 388 U. S. 307, 319 (1967), the Court described *Barr* as a case "where a state court has followed a regular past practice of entertaining claims in a given procedural mode, and without notice has abandoned that practice to the detriment of a litigant who finds his claim foreclosed by a novel procedural bar." If *Barr* itself had used these words, instead of its unprecedented and unnecessary "strictly" language, much confusion could have been avoided.

Some cases in the series reach eminently sensible results on their facts, entirely consistent with precedent, yet inexplicably assert indefensible and unprecedented rationales for them. *Sullivan*, *supra*, is the worst of this lot. The state ground was indeed inadequate because, as Justice Harlan explained in dissent, the appellant had no reason to believe that the procedure he followed was not in compliance. See 396 U. S., at 245-247 (applying the *Patterson* novelty standard). Instead of applying this well-established standard, the *Sullivan* majority made the breathtaking assertion that all rules involving the exercise of discretion are inadequate. See *id.*, at 234; see also *infra*, at 17 (quoting Wright, et al., critique of *Sullivan*). Although *Williams* v. *Georgia*, 349 U. S., at 389, also was based on the discretionary nature of the rule, it was the discriminatory use of that discretion, rather than the mere existence of discretion, that enabled federal review. See *id.*, at 383.

A single, coherent standard is long overdue. The standard should accommodate the need to respect state procedures while recognizing the responsibility of the states to provide meaningful remedies for federal claims, and opening the door to federal relief when they do not. Respect for *stare decisis* also requires a stan-

dard consistent with the results in most of the precedents. That standard, *amicus* submits, can be formed by combining *Patterson*'s "fairly . . . apprised" with *Central Union*'s "reasonable opportunity." That is, the claimant should have fair notice that the rule exists and applies to the circumstances, and he should have a reasonable opportunity to present his federal claim. See Wright, Miller, & Cooper, *supra*, § 4027, at 386-387, 392. Nothing more is required.[3]

B. Policy Reasons.

There are solid policy reasons for federal courts to respect the procedural rules of state courts. See *Coleman* v. *Thompson*, 501 U. S. 722, 745-747 (1991). In our federal system, state courts must necessarily adjudicate federal questions, because it would be impractical to remove every case with a federal issue to federal court. Practical considerations also preclude having two different sets of procedural rules: one for state issues and another for federal. See Wright, Miller, & Cooper, *supra*, § 4021, at 302. A single objection will often have both state and federal grounds, such as the hearsay rule and the Confrontation Clause or the Takings Clause of the Fifth Amendment and a parallel provision of the state Constitution. Having two different sets of rules for the time to raise a single objection would be chaotic.

At one point, Petitioner appears to be arguing for a *Henry*-like standard that all federal objections are

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3. In a criminal case, if trial counsel fails to use the reasonable opportunity, that may form the basis of an ineffective assistance claim, either as an independent claim or as "cause" for the default. That claim, in turn, must be presented to the state courts at the proper time, if one is provided. See *Edwards* v. *Carpenter*, 529 U. S. 446, 452 (2000). In a civil case, a malpractice suit would be the remedy.

preserved if they are made in a manner that is adequate in the particular case, regardless of whether the party complied with clearly established state rules. See Brief for Petitioner 31. Such a rule would be "mischievous," see *Lee* v. *Kemna*, 534 U. S. 362, 394 (2002) (Kennedy, J., dissenting), and the suggestion should be rejected.

On habeas corpus, there is an additional reason for recognizing and giving effect to state procedural default rules. The requirement that the petitioner first exhaust state remedies is a time-honored federal policy. See 28 U. S. C. § 2254(b), (c); *Ex parte Royall*, 117 U. S. 241, 253 (1886). Respect for state procedural default rules is necessary to " 'protect the integrity' of the federal exhaustion rule." *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 845 (1999) (quoting *id.*, at 853 (Stevens, J., dissenting)). Without the default rule, "a prisoner could evade the exhaustion requirement—and thereby undercut the values that it serves—by 'letting the time run' on state remedies." *Ibid.*; see also *id.*, at 848 (opinion of the Court quoting the dissent on this point).

Balanced against these considerations are "the federal interests in protecting federal rights against bad procedure." Wright, Miller, & Cooper, *supra*, § 4021, at 302. Underlying many of the old cases is a strong, if unstated, suspicion of state-court hostility to the underlying federal law. It is no coincidence that the most sweeping statements come in cases of black defendants and the NAACP from the South at the height of the civil rights struggle. See Sandalow, Henry v. Mississippi and the Inadequate State Ground: Proposals for a Revised Doctrine, 1965 Sup. Ct. Rev. 187, 190; see also Glennon, 61 Tenn. L. Rev., at 885-902 (describing how state grounds doctrine shifted during the civil rights struggle and has since shifted back). Fortunately, this era is behind us, and has been for some time. See *Stone* v. *Powell*, 428 U. S. 465, 493,

n. 35 (1976). This is not to say the Court was wrong to do what it did in the 1960s. Great struggles may require drastic measures, but when the crisis is over we should return to the normal modes of procedure. See *Ex parte Milligan*, 4 Wall. (71 U. S.) 2, 109 (1866).

Conscious hostility is not the only danger to federal rights, however. Sometimes a generally fair rule can operate in an unfair manner in a particular case, cutting a party off without a realistic opportunity to make its case. See *Michel* v. *Louisiana*, 350 U. S. 91, 95 (1955). For example, *Hathorn* v. *Lovorn*, 457 U. S. 255, 262-263 (1982), involved a rule against raising new issues in a petition for rehearing. This is generally a fair and unobjectionable rule. In the particular case, though, the state court had salvaged a facially unconstitutional statute through drastic and unexpected surgery, see *id.*, at 258-259, thereby raising a different federal question from the one originally presented. As a practical matter, the petition for rehearing was the first opportunity to raise this claim. Federal rights need protection from an unreasonable refusal to make a needed exception to a normally fair rule.

Lee v. *Kemna*, 534 U. S., at 382-383, is arguably a case of this type. Although a requirement that a motion for continuance be in writing and supported by affidavit is normally fair, it would have been impractical and pointless in the unusual circumstances of the case. *Lee* could also be read more broadly, "to adopt a sweeping general view that 'close enough is good enough,' rejecting the adequacy of state procedural grounds merely because no important procedural interest seems at risk in the specific circumstances." Wright, Miller, & Cooper, *supra*, § 4028, at 46 (2008 Supp.) Such a reading would make *Lee* a radical departure from precedent, though, see *ibid.*, and it would validate the dissent's charge that the majority was reviving the

discredited approach of *Henry* v. *Mississippi*, 379 U. S. 443 (1965). See Hart & Wechsler, *supra*, at 562-563. The *Lee* Court denies it does either of these, see 534 U. S., at 386, so a broad reading of *Lee* is not correct. See *Johnson* v. *Texas*, 509 U. S. 350, 365-366 (1993) (an opinion cannot be read so broadly as to overrule earlier precedents, when the opinion itself expressly holds it does not create a new rule).

The fact that adequacy of a state procedural rule requires making an ad hoc exception in an unusual, unforeseen case such as *Lee* further illustrates the perversity of the Ninth Circuit's insistence that rules can be declared inadequate for not specifying the exceptions in advance or for being too generous in making exceptions. See *supra*, at 6.

Another situation which still arises on occasion is the inherently fair rule that is unfairly applied retroactively. A state may legitimately specify *in advance* which of two possible remedies a claimant must pursue, but it cannot "bait and switch." See *Reich* v. *Collins*, 513 U. S. 106, 111 (1994). Similarly, there is a federal interest in protecting federal rights from unforeseeable applications of existing rules. See *supra*, at 12 (discussing *Sullivan*). A competent lawyer should be able to discern the contours of the rule with sufficient clarity that he or she knows what to do to safely preserve the claim. See *Walker* v. *Birmingham*, 388 U. S., at 320 (petitioners "on notice" of the correct procedure and not "entrapped or misled"). That does not mean that the boundaries of the rule must be so crisp that the lawyer can confidently skate on the edge. There are good reasons for rules to be flexible, see Wright, Miller, & Cooper, *supra*, § 4026, at 386, and flexibility necessarily creates fuzzy boundaries. Fair notice means that a procedure that appears to be in *clear* compliance cannot suddenly be declared to be a default.

However, there is *no* federal interest in compelling or even encouraging the states to purge all discretion from the operation of their procedural default rules. This is the perverse incentive of opinions such as the majority in *Sullivan* v. *Little Hunting Park, Inc.*, *supra*.

> "The possible implication in the Sullivan opinion that discretionary state grounds cannot provide adequate reason to refuse to consider a federal question is unwarranted. There are many valid reasons for framing procedural rules in general, 'discretionary' terms. Precisely defined rules cannot take account of the gravity of a procedural failure, the strength of the excuses offered, or the importance of the procedural and substantive consequences of excusing or punishing the failure. In many circumstances, appellate courts invest lower courts with discretion both because of a belief that a better decision will result, and because of a conviction that in any event the matter does not justify the institutional cost of plenary review. Although there is a modest risk that discretionary procedural sanctions may be invoked more harshly against disfavored federal rights, that does not warrant blanket disregard of state procedure. Instead, the discretionary nature of the state rule may be considered in applying the better tests of adequacy set out in the next section. If discretion has been exercised to impose novel and unforeseeable requirements without fair or substantial support in prior state law, or to deny a fair opportunity to present federal claims, the state ground may be found inadequate." Wright, Miller, & Cooper, *supra*, § 4026, at 385-386.

Along the same line, there is no federal interest in denying effect to any state procedural rule which is not "strictly" applied in the sense of iron-clad severity.

Again, such a formulation provides a perverse incentive for states to make their default rules more severe and less flexible than the state might otherwise choose. "The Court should continue to recognize that sound procedure often requires discretion to exact or excuse compliance with strict rules, and ordinarily should leave the discretion to state courts." *Id.*, § 4028, at 403.

Dugger v. *Adams*, 489 U. S. 401 (1989), illustrates that this Court does not apply the "strictly" requirement literally. The dissent argued that the Florida Supreme Court had reached the merits in two other cases despite the same default, and therefore, under *Barr*, the state rule was inadequate. *Id.*, at 416-418 (Blackmun, J., dissenting). The majority rejected this argument, noting that the rule was applied in "the vast majority of cases." *Id.*, at 411, n. 6. The Court noted that even though the failure to clearly state the procedural default in a few cases would permit federal habeas review in those particular cases, it would not "undercut the adequacy" of the rule in general. *Id.*, at 412, n. 6.

No doubt in the mid-1960s there was a legitimate concern underlying the apparent distrust of discretionary or less-than-strict rules. That was the suspicion they were being used discriminatorily against federal rights, civil rights organizations, and black criminal defendants. See Glennon, 61 Tenn. L. Rev., at 895 (noting "state court efforts to use their procedural rules to impede the civil rights movement"). In 2008, that possibility may not have vanished entirely,[4] but it is a faint shadow of what it was in 1964. Today, the cure is far worse than the disease. Flexibility and discretion in

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4. The present case may very well be a case of bad-faith manipulation of procedural rules against an unpopular defendant.

the application of default rules should be encouraged, not discouraged.

If the state courts really did exercise discretion so as to discriminate on the basis of race or against fundamental rights, that would be a violation of the Equal Protection Clause by itself. A requirement of truly strict application could only be justified as a kind of conclusive presumption to relieve the claimant of the difficult burden of proving discrimination. Such presumptions should only be used where they produce the correct result most of the time. See *Coleman* v. *Thompson*, 501 U. S., at 737. Presuming discrimination from a lack of iron rigidity in the application of default rules would reach the wrong result nearly all of the time.

In general, then, the requirements of fair notice and a reasonable opportunity to comply accommodate all the important policy considerations. Two supplemental rules should also be recognized to deal with unusual situations. A state rule should not be allowed to defeat the policy of a pertinent federal statute, and actual, invidious discrimination in the application of a state rule independently violates the Equal Protection Clause.

C. Consistency with Precedent.

As we noted earlier, respect for *stare decisis* requires that any restatement of the doctrine of adequate and independent state grounds be as consistent as possible with precedent. No coherent theory could possibly embrace the widely disparate language of the precedents, but it is possible to reconcile all but one of the major cases on their facts. "It is black letter law that the holding of a case is determined by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them." *People* v. *Davis*, 7

Cal. 4th 797, 823, 872 P. 2d 591, 608 (1994) (Mosk, J., dissenting) (internal quotation marks omitted). Hence, consistency with the material facts is at least as important as consistency with the language.

First, we can put to one side those cases in which the state rule operates contrary to the policy of a federal statute or regulation. *Davis* v. *Wechsler*, 263 U. S. 22 (1923) belongs in this category. That case involved a suit against a railroad under federal control, and it was brought in violation of a federal executive order prescribing the venue of such suits. See *id.*, at 23; see also *Alabama & Vicksburg R. Co.* v. *Journey*, 257 U. S. 111, 112-114, and n. 1 (1921) (quoting and upholding the order). The purpose of the order was to divest the court of authority to hear the case at all, so the policy considerations supporting respect for state procedure, see *supra*, at 13, diminish to the vanishing point. It would defeat the policy of the order and the statute it implemented to allow a minor misstep in local procedure to subject a federally controlled entity to suit in a court where the case never should have been. Taking a limited view of *Davis*, such as this one, is necessary to reconcile it with *Central Union Tel. Co.* See *supra*, at 9-10.[5] *Brown* v. *Western R. Co. of Ala.*, 338 U. S. 294 (1949), can be considered in the same special class. "*Brown* did not involve a pleading problem at all but rather a misconception by the state court as to the governing substantive [federal statutory] law." Hill, *supra*, 65 Colum. L. Rev., at 973.

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5. An alternative limited view of *Davis* is that the state court's procedural ruling was novel and surprising. See Hill, *supra*, 65 Colum. L. Rev., at 975-976. If Professor Hill is correct, the *Davis* holding on its facts is consistent with our proposed general standard.

The federal statute cases aside, we turn to the facts of other cases. The easiest cases are those where the state rule, as applied, is so grossly unfair as to violate due process. *Reece* v. *Georgia*, 350 U. S. 85 (1955), is the exemplar of this group. The indigent defendant's time to challenge the composition of the grand jury expired before counsel was appointed. See *id.*, at 89-90. This is obviously not a reasonable opportunity to state his federal claim, however clearly established the rule might have been.

Cases involving new rules unfairly applied retroactively fit with our proposed requirement of fair notice. These include *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991), *Johnson* v. *Mississippi*, 486 U. S. 578, 587-589 (1988) (state case law at the time of the "default" indicated that the procedure defendant used was proper), and *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457 (1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence"). *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S. 673, 677-678 (1930), found that the retroactive application of a new rule defaulting the federal claim was a due process violation, so this case fits both categories.

Closely related are those cases where the state rule was clearly established before the "default," but the procedure followed by the federal claimant appeared to be in compliance with the rule as applied up to that time. These include the infamous *Rogers* v. *Alabama*, 192 U. S. 226, 229-230 (1904) (two-page motion stricken as "prolix"), *Sullivan* v. *Little Hunting Park*, discussed *supra*, at 12, and *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). In *Barr*, the state court had held that the objection was "too general to be considered." *Ibid.* Yet, this Court noted, in four other nearly contemporaneous cases, the state court had considered

equally general objections and, significantly, had *granted* relief in two of those cases. See *ibid.* Cases granting relief are more significant than cases reaching the merits but denying relief.[6] In *James* v. *Kentucky*, 466 U. S. 341, 346-348 (1984), the preexisting case law was too confused to give fair notice that defendant had to ask for an "instruction" rather than an "admonition" under the circumstances. In *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958), the Court noted "a long line" of decisions permitting motions like the defendant's. Petitioner contends that the application of the "correct in all respects" rule in the present case fails the fair notice requirement. See Brief for Petitioner 39.

Finally, there are the cases where the rule as applied denies a reasonable opportunity to present the federal claim, however well established it may be and however fair it may be in most cases. *Hathorn* v. *Lovorn*, 457 U. S. 255 (1982), illustrates this category. The petition for rehearing in that case was the first opportunity to present the federal question as a practical matter. See *supra*, at 15. Regardless of whether the state rule against raising new issues on petition for rehearing violated due process as applied, the plaintiffs did not have a fair opportunity to present their claim, and hence the state ground was not adequate to bar federal review. In *Ward* v. *Board of Commr's of Love Cty.*, 253 U. S. 17, 23 (1920), the "coercive means" used by local authorities to illegally tax exempt Indian land had left the Indians with no reasonable opportunity to make the

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6. A decision to deny a clearly meritless claim on the merits rather than deal with a difficult procedural question may be justified as a simple matter of judicial economy. See *Lambrix* v. *Singletary*, 520 U. S. 518, 525 (1997). Such a sensible procedure should not be considered a failure to regularly enforce the rule.

prepayment challenge the state required. *Lee* v. *Kemna*, *supra*, also fits in this category. See *supra*, at 15.

The one case that cannot be reconciled on its facts is *Henry* v. *Mississippi*, 379 U. S. 443 (1965). That case involved a contemporaneous objection rule. *Id.*, at 445-446. The defendant did not object to certain evidence when it was introduced, although he did later. *Ibid.* The actual holding of this confusing case was to remand to the state court with an invitation to adopt the "deliberate bypass" standard of *Fay* v. *Noia*, 372 U. S. 391 (1963) for its own procedural default rule. See *Henry*, *supra*, at 453.[7]

Henry's deficiencies were obvious at the time and were cataloged in Justice Harlan's dissent, *id.*, at 457-465, and Professor Hill's article, *supra*, 65 Colum. L. Rev., at 982-992. Today, there are additional reasons the Court should not be too concerned with *Henry* as precedent. The decision itself is routinely ignored. See *supra*, at 10-11; *Lee*, 534 U. S., at 394 (Kennedy, J., dissenting). Most importantly, though, *Henry* is heavily dependent on *Fay* v. *Noia*, which has since been overruled. See Wright, Miller, & Cooper, *supra*, § 4020, at 282, 291. At this point, *Henry* has so little value as precedent that it should not prevent the formulation of a coherent standard.

In summary, a coherent standard of "adequate" state grounds is needed to replace the existing patchwork for state procedural default rules. An adequate state procedural rule is one that (1) gives fair notice that the rule exists and applies, and (2) provides a reasonable opportunity to present the claim. This

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7. The state court declined the invitation. This Court denied certiorari, superfluously adding that the denial was without prejudice to habeas relief, and Henry subsequently obtained habeas relief. See Glennon, 61 Tenn. L. Rev., at 898-899.

standard embraces the important policy considerations and is consistent with all the major precedents, except for one case that should no longer be considered a valid precedent.

CONCLUSION

The procedural default rule invoked by the Oregon Supreme Court should be considered "adequate" if, and only if, the defendant had fair notice of the existence and applicability of the rule and a reasonable opportunity to comply with it.[8]

August, 2008

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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8. *Amicus* CJLF takes no position on whether the rule is adequate under this standard or on the remaining issues in this case.

AMICUS CURIAE BRIEF

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No. 07-1216

OCT 9 - 2008

In The

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF AMICI CURIAE FEDERAL PROCEDURE SCHOLARS IN SUPPORT OF RESPONDENT

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
4500 Berkeley Place
Irvine, CA 92697-8000
(949) 824-0066

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF AMICI CURIAE[1]

Amici curiae are law professors and scholars at prominent universities in the United States. Each of the amici has expertise in federal and state procedure and in the concept of federalism that honors the respective roles of state courts and federal courts in providing access to justice for litigants in this country. The Federal Procedure Scholars file this brief to counter the assertion that routine state procedural requirements may be bypassed or ignored to address an alleged constitutional violation that was never properly presented to the trial court. Short biographies of each amicus are provided in Appendix A.

SUMMARY OF ARGUMENT

Although Philip Morris portrays the decision below as the product of a rebellious state supreme court refusing to obey a clear directive of this Court, an unbiased and dispassionate review of the decisions in question and of basic principles of state and federal procedure reveals otherwise. In reaffirming the trial

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the amici curiae's intention to file this brief. In addition to amici and their counsel, this brief was prepared with the assistance and financial support of Brent Rosenthal and the law firm of Baron & Budd, P.C., Dallas, Texas. No other person or entity made a monetary contribution to the preparation or submission of this brief.

court's award of punitive damages, the Oregon Supreme Court held that Philip Morris did not properly request the constitutional protection (in the form of a jury instruction) contemplated by this Court in its opinion because the proposed instruction was commingled with several erroneous propositions of law. Philip Morris condemns the Oregon Supreme Court's application of the rule requiring that a proposed instruction be correct in all respects as unconventional and hyper-technical, but a survey of state law indicates that at least eighteen states in addition to Oregon apply the same rule in the same way. And although Philip Morris insists that the rule as applied by the Oregon Supreme Court in this case serves no legitimate state interest, this Court and others have explicitly recognized that procedural default rules such as the one applied in this case promote the important state interests of requiring parties to raise issues promptly and coherently, of minimizing the need for trial judges to parse incorrect or contradictory proposals, and of protecting the finality of judgments.

No federal or state rule or practice prohibited the Oregon Supreme Court from considering state grounds for affirmance after remand from this Court, particularly as this Court's decision recognized a right to some form of constitutional protection only "upon request." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007). The Oregon Supreme Court properly decided the open question of whether Philip Morris made a proper request for the protection.

Although, in hindsight, the more efficient course would have been to decide the sufficiency of the request first, the Oregon Supreme Court's approach was not unique. In several recent cases, a state supreme court, after reversal by this Court on federal grounds, reinstated its prior decision based on its application of independent state law, and this Court has respected those decisions. In the interests of federalism and comity, it should respect the decision below as well.

ARGUMENT

I. The Independent State-Law Ground for Affirmance Stated by the Oregon Supreme Court Is Well-Established and Not Novel or Pretextual.

A. The Rule That a Trial Court Does Not Err in Refusing To Give a Jury Instruction That Commingles Valid and Erroneous Propositions of Law Is "Firmly Established" and "Regularly Followed," Both in Oregon and in Many Other Jurisdictions.

In declining to disturb the trial court's judgment based on its refusal to give the instruction on punitive damages proposed by Philip Morris, the Oregon Supreme Court applied the "well-understood" rule that an appellate court will not find error in the refusal to give a proposed instruction unless it was "clear and correct in all respects, both in form and

substance, and . . . altogether free from error." *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1261 (Or. 2008) (quoting *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975). In its brief, Philip Morris disparages the court's application of the rule as "nothing more than a pretext for refusal to protect Philip Morris's due process rights." Br. Pet'r 2. But as Williams demonstrates thoroughly in her brief in response, the rule is deeply rooted in Oregon jurisprudence. *See* Br. Resp't 25-31. The Oregon appellate courts have applied the rule consistently since 1916, and have clearly explained to the bench and bar the need to present trial courts with error-free proposals in order to assert error on appeal should they be denied. *See e.g.*, *Sorenson v. Kribs*, 161 P. 405, 409-10 (Or. 1916); *Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972); *Hernandez v. Barbo Machinery Co.*, 957 P.2d 147, 151 (Or. 1998).[2]

---

[2] For the reasons explained in Williams' brief, *State v. George*, 97 P.3d 656 (Or. 2004) does not represent a departure from this rule. *See* Br. Resp't 31-33. In *George*, a criminal defendant successfully challenged the failure of the trial court to instruct the jury of the consequences of an insanity verdict in accordance with an Oregon statute despite the defendant's failure to request a proper instruction at trial. The supreme court explained that although Oregon law ordinarily requires a party complaining of the refusal to give an instruction to have made a proper request, the statute in question "unequivocally places the responsibility for giving the required instruction on the trial court, without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." 97 P.3d at 661-62. Of course, no such statute is involved in this case.

The principle applied by the Oregon Supreme Court in this case is not some local anomaly. One leading treatise notes that generally, it is "proper to refuse a series of instructions or propositions asked in gross, some of which are correct and others incorrect." 89 C.J.S. Trial § 716 (West 2001), at 344. The editors add that although the rule has been modified in some jurisdictions, "[a] general exception to a refusal to give several instructions requested collectively is usually insufficient if any of the instructions are erroneous. . . ." 89 C.J.S. Trial § 734 (West 2001), at 365 (footnotes omitted).

As the chart appended to this brief indicates, at least eighteen other jurisdictions have expressly adopted and applied the rule, often in terms virtually identical to those used to explain the rule in Oregon.[3] Some courts rely on agricultural metaphors to describe the concept, referring to the need to separate "wheat from chaff"[4] or "sheep from goats;"[5] others speak simply of the duty of counsel to separate the good from the "bad"[6] in their proposed instructions. Whatever the terminology, the rationale for the rule is fundamental and consistent: a party will not be

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[3] *See* Appendix B to this brief, entitled "Jurisdictions That Have Applied the 'Correct in All Respects' Rule."

[4] *See, e.g., Commonwealth v. Kloiber*, 106 A.2d 820, 825 (Pa. 1954).

[5] *See, e.g., Public Service Co. of Oklahoma v. Bleak*, 656 P.2d 600, 608 (Ariz. 1982).

[6] *Forester v. State*, 272 S.W.2d 320, 322 (Ark. 1954).

heard to complain of error in a jury instruction if it did not furnish the trial court with an accurate and practical substitute.

As the Oregon Supreme Court found and as Williams demonstrates in her brief, the compound instruction on punitive damages proposed by Philip Morris is infected with multiple, substantial errors justifying its refusal by the trial court. *See Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1261-64 (Or. 2008); Br. Resp't 20-25. The Oregon Supreme Court properly applied Oregon law in holding that the trial court did not err in refusing to give Philip Morris's defective punitive damages instruction.

B. The Rule Barring Complaint on Appeal of the Denial of a Requested Instruction That Is Not Correct in All Respects Serves a Legitimate State Interest.

This Court recently emphasized the importance of state procedural default rules in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). In that case, a Honduran national was charged, tried, and convicted of a crime without being advised that under the Vienna Convention on Consular Relations, he had a right to request that his consulate be notified of his detention. He did not assert the alleged violation of the treaty until he initiated habeas corpus proceedings after his conviction was affirmed. The Court refused to overlook "the importance of procedural default rules in an adversary system, which relies chiefly on the *parties*

to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication." 548 U.S. at 356 (emphasis in original). Specifically, the Court noted that procedural default rules "are designed to encourage parties to raise their claims promptly and to vindicate 'the law's important interest in the finality of judgments,'" *id.* (quoting *Massaro v. United States*, 538 U.S. 500, 504 (2003), and stressed that such rules apply "even to claimed violations of our Constitution." *Id.* at 334.

The widespread application of the requirement that a party cannot complain on appeal of the refusal to give a valid instruction joined with erroneous instructions itself suggests the wisdom and legitimacy of the rule. One obvious purpose of the rule is to minimize the burden on the trial judge and to reduce the risk of confusion. As one federal court has noted, the responsibility to request an instruction free from legal error is not a formality: the trial court, especially in hearing objections after the instructions have been given, "is making on-the-spot choices; and when the instruction offered by the lawyer is manifestly overbroad, the district judge may reject without assuming the burden of editing it down to save some small portion that may be viable." *Parker v. City of Nashua*, 76 F.3d 9, 12 (1st Cir. 1996). Trial courts should not be "required to rewrite an improper instruction to capture a kernel that may have some validity; it is counsel's job to present an unimpeachable instruction." *McCann v. Wal-Mart Stores, Inc.*, 210 F.3d 51, 55 (1st Cir. 2000).

Moreover, the rule provides an effective disincentive for parties to bundle valid and questionable propositions in the hope that the trial court will give the group of instructions en masse. Contrary to Philip Morris's apparent assumption, the circumstances of this very case demonstrate the benefits of the rule requiring that proposed instructions be "correct in all respects" – and the expense and injustice of a refusal to apply the rule. Here, Philip Morris combined the proposed instruction about harm to other parties with other instructions about factors to consider in calculating punitive damages and then objected only to the court's refusal to give the entire package. In so doing, Philip Morris denied the trial court a realistic opportunity to consider whether a discrete, stand-alone instruction concerning harm to other parties was warranted. As Williams points out in her brief, the trial judge clearly believed that Philip Morris's concern about punishment for harm to others had been addressed to Philip Morris's satisfaction by other instructions. Br. Resp't 14-16. Thus, Philip Morris's general objection to the refusal to give its Request No. 34 did not apprise the trial court of the particular deficiency of which Philip Morris now complains.

This Court recently reiterated the self-evident proposition that "[a] State's highest court is unquestionably the ultimate exposito[r] of state law." *Riley v. Kennedy*, 128 S. Ct. 1970, 1985 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). It is true, as Philip Morris emphasizes and as this Court has observed, that "[o]n rare occasions the Court has

re-examined a state-court interpretation of state law when it appears to be an "obvious subterfuge to evade consideration of a federal issue." *Mullaney v. Wilbur*, 421 U.S. 684, 691 n. 11 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)). But this is not such an occasion. *Cf. Bush v. Gore*, 531 U.S. 98, 141 (2000) (Ginsburg, J., dissenting) (this case "involves nothing close to the kind of recalcitrance by a state high court that warrants extraordinary action by this Court. . . . The court surely should not be bracketed with state high courts of the Jim Crow South.").

The rule applied by the Oregon Supreme Court is deeply rooted in Oregon law and practice, is not an idiosyncratic rule but one that is applied in many jurisdictions, and serves obvious and legitimate state interests. This Court should not interfere with the Oregon Supreme Court's proper and straightforward application of its own procedural rules.

II. No Federal or State Rule or Practice Prohibited the Oregon Supreme Court from Considering the State-Law Basis for Affirmance After the Most Recent Remand by This Court.

Had the Oregon Supreme Court applied its rule that the refusal to give a legally incorrect instruction is not error the first time it considered this case, its disposition would have been relatively inconspicuous. Every day, state courts affirm judgments over constitutional objections that have not been preserved

under valid and unremarkable state procedural rules. What is unusual about this case is the timing of the Oregon court's decision; it considered Williams' state-law ground for affirmance only after this Court granted certiorari and held that a defendant, "upon request," is entitled to "*some* form of protection" from having punitive damages imposed as punishment for harming persons other than the plaintiff. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007) (emphasis in original).

It is indeed unfortunate that the Oregon Supreme Court did not reach Williams' state-law basis for affirmance until after this Court considered the constitutional issue, and that this Court granted certiorari despite Williams' insistence that the state procedural rule should prevent the Court from reaching the constitutional question. As Justice Ginsburg has noted, although an opinion like the one previously issued by the Court in this case "may not be technically 'advisory,'" the affirmance by the Oregon Supreme Court of the judgment in this case on a state-law ground "suggest[s] that the Court unnecessarily spent its resources on [a case] better left, at the time in question, to state-court solution." *Arizona v. Evans*, 514 U.S. 1, 33 (1995) (Ginsburg, J., dissenting).

The procedural posture of the case, however, is hardly Williams' fault; as Williams points out and Philip Morris concedes, Williams urged her state-law ground for affirmance every step of the way. Moreover, as Williams explains in her brief, the larger procedural context of this case – with its serial trips

to the Oregon Supreme Court and this Court – explains, at least in part, why the courts (other than the Oregon Court of Appeals) did not address the state-law ground.

While unfortunate, the courts' haste to reach the constitutional issue provides no good reason to deny Williams the rights conferred on her by state law and to protect Philip Morris from the fair consequences of its trial strategy. Commentators have pointed out that while unusual, the procedural journey of this case is hardly unheard-of; "[i]n a considerable number of cases in which the Court has granted certiorari because a plain statement [of the state law basis of decision] was lacking . . . the state courts have ended up re-deciding the cases on remand and reaching opposite results from those arrived at by their federal counterparts." Ken Gormley, *The Silver Anniversary of New Judicial Federalism*, 66 Alb. L. Rev. 797, 805 (2003); *see also* Richard W. Westling, Comment, *Advisory Opinions and the "Constitutionally Required" Adequate and Independent State Grounds Doctrine*, 63 Tul. L. Rev. 379, 389 n. 47 (1988) (noting that in the period between July 1, 1983 and January 1, 1988, in 26 percent of the cases in which the Court decided cases in which adequate and independent state grounds were raised, the state court on remand reinstated its prior decision based on the state grounds).

Racing Ass'n of Central Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa), *cert. denied*, 541 U.S. 1086 (2004) provides a recent example. In that case, the Iowa

Supreme Court held that a statute taxing gambling receipts generated at racetracks at a rate nearly twice the rate imposed on gambling receipts generated on riverboats violated the racetracks' constitutional right to equal protection. *Racing Ass'n v. Fitzgerald*, 648 N.W.2d 555, 562 (Iowa 2002). This Court reversed, holding that the statute did not violate the federal due process clause. *Fitzgerald v. Racing Ass'n*, 539 U.S. 103 (2003). On remand, the Iowa Supreme Court reinstated its earlier decision, holding specifically that the statute violated the equal protection clause of the Iowa Constitution. *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 3 (Iowa 2004). Justice Cady dissented, pointing out that "[w]e did not state in *RACI* that our opinion was based on 'adequate and independent state grounds' nor did we even indicate that might be the case." 675 N.W.2d at 27 (Cady, J., dissenting). He added that by adhering to its prior opinion, "the majority is taking a second bite at an apple that has long since dropped and rolled away from our tree," *id.*, and found the decision "offensive to the Supreme Court, its important role in the judicial system, and the principles of federalism on which our entire system operates." *Id.* at 28. Notwithstanding Justice Cady's strongly-expressed observations, this Court denied certiorari.

Other state high courts have validly applied state law after remand to avoid a constitutional question that this Court had anticipated. In *Pennsylvania v. Labron*, 518 U.S. 398 (1996), this Court overturned a decision of the Pennsylvania Supreme Court that

suppressed a warrantless search of an automobile, holding that the federal constitution did not require that result. On remand, the Pennsylvania Supreme Court restored its prior ruling, asserting that it was a proper application of the state constitution notwithstanding this Court's decision. *Commonwealth v. Labron*, 690 A.2d 228 (Pa. 1997). In *New York v. Class*, 475 U.S. 106 (1986) the New York Court of Appeals suppressed the results of a warrantless search, but this Court reversed, expressly rejecting the state's contention that the New York court's decision rested on an adequate and independent state ground. 475 U.S. at 109-10 (1986). On remand, however, the New York court reinstated its prior decision, holding that despite this Court's finding to the contrary, its ruling was based on the New York Constitution. *People v. Class*, 494 N.E.2d 444, 445 (N.Y. 1986).

"Procedural default rules are designed to encourage parties to raise their claims promptly and to vindicate 'the law's important interest in the finality of judgments.'" *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 356 (2006) (quoting *Massaro v. United States*, 538 U.S. 500, 504 (2003)). Even at this late date in this litigation, it is not too late for the Oregon Supreme Court, or for this Court, to vindicate that interest. Oregon's rule authorizing its trial courts to reject proposed jury instructions that are not entirely free from error is a common one, and the Oregon Supreme Court's conclusion in response to this Court's remand that Philip Morris did not properly request the constitutional protection it sought on

appeal was neither wrong nor untimely. This Court should respect the proper application of Oregon law by the Oregon Supreme Court.

CONCLUSION

The Court should dismiss the writ of certiorari as improvidently granted or, in the alternative, affirm the judgment of the Oregon Supreme Court.

Respectfully submitted,

ERWIN CHEMERINSKY
Counsel of Record
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW
4500 Berkeley Place
Irvine, CA 92697-8000
(949) 824-0066

Counsel for Amici Curiae

APPENDIX A
LIST OF AMICI CURIAE
FEDERAL PROCEDURE SCHOLARS

Anne Bloom is Associate Professor of Law at the McGeorge School of Law at the University of the Pacific. She teaches Torts, Legislation, and Complex Litigation, and her research interests include mass torts and the motivation and culture of the plaintiff's bar.

Erwin Chemerinsky is Dean and Distinguished Professor of Law at the University of California, Irvine School of Law. He is the author of six books on federal practice and constitutional law. His most recent book is entitled *Empowering Government: Federalism for the 21st Century*, published by Stanford University Press in 2008.

Christopher M. Fairman is Professor of Law at the Michael E. Moritz College of Law at The Ohio State University. He teaches Civil Procedure and Alternative Dispute Resolution, and his areas of expertise include legal ethics and collaborative law. He has published numerous articles on federal and state court procedure and legal ethics.

Lonny S. Hoffman is the George Butler Research Professor of Law at the University of Houston Law Center. His primary area of teaching and the scholarly focus of his research and writing is the law of federal courts and civil procedural law in the state and federal courts. Professor Hoffman's published

work examines federalism issues and on the relationship between judicial and legislative authority as it impacts the adjudication of private rights.

Arthur Miller is University Professor at New York University School of Law. Previously, Professor Miller was Bruce Bromley Professor of Law at Harvard Law School, where he taught for thirty-six years. He is co-author with the late Charles Alan Wright of *Federal Practice and Procedure*, considered the leading treatise on the subject of civil and criminal procedure in the federal courts.

Elizabeth G. Thornburg is Professor of Law at Southern Methodist University Dedman School of Law. She teaches Civil Procedure, Conflict of Laws, Complex Litigation, Texas Procedure, Remedies, and an advanced procedure seminar. Drawing on her experience with civil rights and commercial litigation, her scholarship focuses on the procedural fairness of the litigation process, especially at the pleadings, discovery, and jury charge stages. She also writes and speaks in the areas of comparative procedure, online dispute resolution, and the intersection of law and culture.

Michael E. Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. He teaches courses in civil procedure, federal courts, and conflict of laws, and has published numerous books and law review articles on the same topics. Professor Solimine's scholarship focuses on the doctrinal, policy, and empirical implications of the

litigation of federal constitutional and statutory issues in federal and state courts. He is also the co-author of books on civil procedure in the state courts of Ohio, and has served as Counsel (i.e., reporter) to the Civil Rules Subcommittee to the Rules Advisory Committee of the Ohio Supreme Court.

Georgene M. Vairo is Professor of Law and William M. Rains Fellow at Loyola Law School in Los Angeles, California. Professor Vairo is an authority on federal court jurisdiction and procedure, and complex litigation. She has written numerous articles on mass tort litigation, federal practice, and jurisdiction, and has written and edited several books, including *Rule 11 Sanctions; Civil Practice and Litigation in Federal and State Courts; Federal Civil Practice in New York Federal Courts;* and *Understanding Federal Courts,* with Professor Martin Redish of Northwestern Law School and Professor Linda Mullenix of the University of Texas School of Law.

Stephen I. Vladeck is Associate Professor of Law at American University Washington College of Law. His teaching and research interests include federal courts, national security law, constitutional law, and criminal law. He has authored many articles on federal practice in the detention of suspected terrorists and on the use of habeas corpus to vindicate federal constitutional rights.

APPENDIX B

JURISDICTIONS THAT HAVE APPLIED THE "CORRECT IN ALL RESPECTS" RULE

Arizona

Public Service Co. of Oklahoma v. Bleak, 656 P.2d 600, 608 (Ariz. 1982) ("If a requested instruction is partly correct and partly incorrect, it is not the duty of the trial court to 'separate the sheep from the goats' and the entire instruction may be properly refused.")

Arkansas

Forester v. State, 272 S.W.2d 320, 322 (Ark. 1954) ("It is well settled that a general exception to the refusal to give several instructions requested collectively will not be considered on appeal, if any of them are bad.")

California

Shaw v. Pacific Greyhound Lines, 323 P.2d 391, 394 (Cal. 1958) ("A trial judge is not required to correct a requested instruction which is incomplete or erroneous."); *see also Hazelwood v. Gordon*, 61 Cal. Rptr. 115, 118 (Cal. Ct. App. 1967) ("[A] court is not bound to separate the applicable portion of an instruction from the inapplicable, nor obligated to modify a requested instruction.")

Colorado

Portland Gold Mining Co. v. O'Hara, 101 P. 773, 775 (Colo. 1909) ("The exception taken, being general to all the instructions offered by defendant en masse, will not be considered by this court upon review.")

Florida

Britt v. State, 102 So. 761, 763 (Fla. 1924) ("It has been the rule of appellate procedure in this state since the existence of this court, that when one exception is taken to the entire charge of the court the exception fails if the charge contains a single correct proposition of law. The rule applies with equal reason to an exception taken to the court's refusal to give several instructions.")

Georgia

Barrett v. Barrett, 170 S.E. 70, 74 (Ga. 1933) (trial court did not err in the "refusal of the requests for instruction to the jury presented en bloc, some of which were at variance with the law of the case. . . . "); *see also Department of Transp. v. Patten Seed Co.*, 660 S.E.2d 30, 34 (Ga. Ct. App. 2008) ("[i]f *any portion* of a requested charge is inapt, incorrect, misleading, confusing, argumentative, not precisely adjusted or tailored, or not reasonably raised or authorized by the evidence, denial of the requested charge is proper.") (citations omitted; emphasis in original)

Indiana

Foster v. United Home Improvement Co., 428 N.E.2d 1351, 1359 (Ind. Ct. App. 1981) (instruction properly refused because it was "misleading for a variety of other reasons" than those relied on by appellant)

Louisiana

Barrois v. Service Drayage Co., 250 So.2d 135, 146 (La. Ct. App. 1971) ("If a requested instruction is erroneous, faulty, or defective, it is properly refused, whether it is erroneous in whole or in part. It is likewise proper to refuse a series of instructions or propositions asked in gross, some of which are correct and others incorrect.")

Michigan

Williams v. City of Lansing, 115 N.W. 961, 963 (Mich. 1908) ("This latter part of the request was, as stated in the former part of our opinion, erroneous, and therefore the trial court could not give the request under consideration.")

Missouri

Chouteau v. Missouri-Lincoln Trust Co., 276 S.W. 49, 54 (Mo. 1925) ("There are certain paragraphs which, if they had been offered as single instructions, should have been given, but we cannot assume they were so offered; nor can we convict the trial court of error in not separating the good from the bad."); *see also*

Samuels v. Illinois Fire Ins. Co., 354 S.W.2d 352, 361 (Mo. Ct. App. 1961) ("It is not error to deny a request for an instruction unless it is correct in all respects.")

Montana

Dorall v. Davis, 360 P.2d 409 (Mont. 1961) ("A requested instruction, erroneous in part, is properly excluded, and this is true even though part of the instruction may have been proper.") (citation omitted)

Nebraska

In re Johnson's Estate, 16 N.W.2d 504, 515 (Neb. 1944) ("Where one of several instructions asked by a party fails to correctly state the law, error cannot be predicated upon an exception taken to the refusal of the court to give the instructions as a whole.") (internal quotation marks and citation omitted)

New Jersey

Willcox v. Christian & Missionary Alliance, 12 A.2d 709 (N.J. Ct. App. 1940) ("[I]n our jurisdiction a request to charge containing several propositions is weighed not by its strength but by its weakness since, if unsound in any particular, it may be rejected in its entirety.")

North Dakota

Wrangham v. Tebelius, 231 N.W.2d 753, 757 (N.D. 1975) ("The trial court is not bound to revise and restate instructions that are not presented in proper form and which mingle correct statements of the law with those that are incorrect and ambiguous.")

Ohio

McKay v. Ohio Fuel Gas Co., 51 N.E.2d 909 (Ohio Ct. App. 1942) ("There is a presumption that several special requests for instructions, when not offered as several and independent propositions of law, are offered as a series, and if one of them fails to state a correct proposition of law applicable to the facts of the case, it is not error for the Court to refuse all of them.") (internal quotation marks and citation omitted)

Pennsylvania

Commonwealth v. Kloiber, 106 A.2d 820, 825 (Pa. 1954) ("Where a point for charge contains good law and bad law a Court is not bound to remold the point and separating the good from the bad, the wheat from the chaff, affirm that portion of the point which is an accurate statement of the law.")

South Carolina

Edens v. Cole, 261 S.C. 556, 201 S.E.2d 382, 387 (S.C. 1973) "Each request to charge is a unit and a trial

judge is not called upon to separate a request to charge into parts, charging such as are sound and rejecting such as are unsound.") (citation omitted); *see also Bradley v. Keller*, 156 S.E.2d 638, 640 (S.C. 1967) ("There is no duty on the part of the trial judge to dissect a request to charge, which contains error, in order to extract therefrom any unobjectionable part and grant it.")

Washington

Crossen v. Skagit County, 669 P.2d 1244, 1248 (Wash. 1983) ("The clear rule is that a trial court need never give a requested instruction that is erroneous in any respect.") (internal quotation marks and citation omitted)

AMICUS CURIAE BRIEF

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(11)

No. 07-1216

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In The

Supreme Court of the United States

PHILIP MORRIS USA, INC.,
Petitioner,

v.

MAYOLA WILLIAMS, PERSONAL REPRESENTATIVE OF THE ESTATE OF JESSE D. WILLIAMS, DECEASED,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

JAN S. AMUNDSON
QUENTIN RIEGEL
NATIONAL ASSOCIATION
OF MANUFACTURERS
1331 PENNSYLVANIA AVE., N.W.
WASHINGTON, DC 20004

FRANCIS R. ORTIZ
Counsel of Record
ROBERT W. POWELL
DICKINSON WRIGHT PLLC
500 WOODWARD AVENUE
SUITE 4000
DETROIT, MI 48226
(313) 223-3500
fortiz@dickinsonwright.com

Counsel for Amicus Curiae

August 20, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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INTEREST OF AMICUS CURIAE

The National Association of Manufacturers ("NAM") is the largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 States. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to economic growth and to increase understanding among policymakers, the media, and the public about the vital role of manufacturing in America's economic future.

Because product manufacturers, including the NAM's members, frequently face product liability claims involving mass produced products, they are exceedingly vulnerable to attempts to punish them in an individual lawsuit for all of the harm that a particular product purportedly has caused. Accordingly, the NAM and its members have a tremendous interest in the effective enforcement of this Court's prior decision in this case holding that punishment for allegedly causing harm to nonparties is unconstitutional. Because the Oregon Supreme Court's decision thwarts that ruling in a number of ways, the NAM files this amicus brief supporting the petitioner's request for reversal.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel, made a monetary contribution to its presentation or submission.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court's decision denying all relief for a clear violation of this Court's holding in *Philip Morris USA v Williams*, 127 S. Ct. 1057 ("Williams II") is based on the erroneous belief that the protection against unconstitutional punishment required by that decision is limited to a properly requested jury instruction. In fact, this Court recognized a broad constitutional principle in *Williams II* that can be violated in various ways – including the admission or use of improper evidence or argument or improper consideration of nonparty harm in appellate review. Thus, a variety of protections may be required by *Williams II*.

In particular, contrary to the assumption of the Oregon court and a number of other courts applying *Williams II,* this Court did not hold that actual harm to nonparties may be used directly to increase punishment "under the rubric of reprehensibility" as long as a jury instruction is given. This interpretation would render the decision a nullity. The Oregon court's narrow focus on whether a particular jury instruction was requested ignored other violations of *Williams II*.

II. Because its application was based on misinterpretation of *Williams II,* the purported procedural rule invoked by the Oregon Court is not an "independent and adequate" ground for the decision. In addition, the purported rule applied by the Oregon Supreme Court is exactly analogous other discretionary rules of "pointless severity" that have been routinely rejected by this Court as providing

"adequate" state grounds for denying a federal right that plainly was raised. It should be rejected here as well.

ARGUMENT

The Oregon Supreme Court's decision on remand that Philip Morris forfeited its right to protection from unconstitutional punishment, purportedly because it did not request a jury instruction in exactly the right format, has all the earmarks of an evasion of this Court's mandate in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 *("Williams II")*. The purported procedural rule deployed by the court was relied on for the first time after this Court ruled on the merits of the constitutional issue; the rule was applied inconsistently with the Oregon courts' previous willingness to consider Philip Morris' request as a separate instruction; and the rule was applied with pointless severity to deny a claim on which this Court had disagreed with the Oregon court.

Beyond those glaring deficiencies, however, the decision also is based on an erroneous interpretation of *Williams II* as establishing nothing more than a right to a particular jury instruction. This interpretation of *Williams II* threatens to trivialize the decision and rob it of much of its force.

The Oregon Supreme Court, by focusing on the particular format of the jury instruction that Philip Morris requested, ignored the broader constitutional principle in *Williams II* and the indisputable fact that Philip Morris "requested" protection from unconstitutional punishment, that all protection was

denied, and that a violation occurred. Because a state law ground for decision is not "independent and adequate" if based on an erroneous interpretation of federal law, this Court should reject the Oregon Supreme Court's attempt to reduce the important constitutional principle announced in *Williams II* to nothing more than the right to request a jury instruction.

I. THE OREGON SUPREME COURT'S DECISION IS BASED ON AN ERRONEOUS INTERPRETATION OF *WILLIAMS II* THAT THREATENS THE CONSTITUTIONAL PRINCIPLE THIS COURT RECOGNIZED.

A. Williams II Announced A Broad Constitutional Principle That May Require A Variety of Protections.

Over the last decade, in a series of decisions, this Court has established an important principle of constitutional due process: in adjudicating an individual civil wrong, a court may punish the defendant, if at all, only for that individual wrong. In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), the Court held that punishment in an individual civil case must bear a "reasonable relationship to the harm suffered by the individual plaintiff." In *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), the Court held that a defendant may be punished only for the conduct that harmed the plaintiff, and not for other wrongful or unsavory conduct directed toward others. Significantly, in *State Farm*, this Court expressly held that, "[d]ue process does not permit courts, in the calculation of punitive

damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423. This principle is violated, the Court held, when a court punishes on the basis that "[t]he harm is minor to the individual but massive in the aggregate." *Id.*

These decisions culminated, and found full expression, in this Court's prior decision in this case, in which it unequivocally held that due process does not allow courts to impose civil punishment for allegedly causing harm to persons who are not parties to the litigation. *Williams II*, 127 S. Ct. at 1065 ("We did not previously hold explicitly that a jury may not punish for harm caused others. But we do so hold now.") This holding, like that in *State Farm*, was based in significant part on the fundamental unfairness of allowing a court or jury, in imposing punishment, to assume that the defendant actually has injured other persons whose claims, if any, have not been adjudicated in the action. *Id.* at 1063. ("[T]he Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.' . . . Yet a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge. . . .")

This is an extremely important principle of procedural due process that strikes at the heart of the unfairness and arbitrariness that has arisen in the administration of punitive damages law. As applied by some courts, this law has allowed a single jury to impose punishment as if its assessment of an individual case applies to the actual or potential claim

of every individual injured by the same, similar, or even dissimilar conduct of the defendant – even when other juries hearing actual cases have exonerated the defendant for that very conduct. *See, Gore,* 517 U.S. at 565, n. 8 (noting that another jury hearing a similar case had imposed no punishment).

The mistaken notion that global punishment is permissible in an individual case may be the greatest single source of the arbitrarily large punitive damages awards that drew this Court's constitutional attention in the first place. *See, Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008) ("The real problem, it seems, is the stark unpredictability of punitive awards . . . the outlier cases subject defendants to punitive damages that dwarf the corresponding compensation."). Effective and good faith enforcement of the constitutional principle recognized in *Williams II,* therefore, is integral to eliminating arbitrary civil punishment.

Regarding that enforcement, this Court held broadly that courts may not adopt procedures that create "an unreasonable and unnecessary risk" of unconstitutional punishment, and that, "upon request," courts "must protect against that risk." *Id.* at 1065. While recognizing that States have "some flexibility" in how to prevent unconstitutional punishment, this Court did not hold or suggest that adequate protection always, or necessarily, is limited to giving a jury instruction.

This Court recently recognized the ineffectiveness of jury instructions in preventing arbitrary punishment, *Baker*, 128 S. Ct. at 2628 ("Instructions

can go just so far in promoting systemic consistency when awards are not tied to specifically proven items of damage . . ."). Many courts also have recognized that jury instructions may be inadequate protection against highly prejudicial evidence or argument. *Bruton v. United States,* 391 U.S. 123, 135 (1968) ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."); *Derden v. McNeel*, 938 F.2d 605, 617 (5th Cir. 1991) ("The judge did instruct the jury to disregard the testimony. By that time, however, the skunk was already in the jury box and the stench could not be removed."); *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1569, fn. 18 (11th Cir. 1991). Effective enforcement of the due process principle recognized in *Williams II,* therefore, may require significant limits on the admission and use of alleged nonparty harm in cases seeking punitive damages, beyond simply giving a jury instruction prohibiting improper punishment.

From a procedural perspective, this means that the constitutional principle recognized in *Williams II* may be raised in a variety of ways, including objections to the admission and use of evidence or argument because they create an "unreasonable and unnecessary" risk of unconstitutional punishment, objections to reliance on nonparty harm in post judgment review, or even a request for an imperfect jury instruction that is nevertheless sufficient to bring the constitutional violation to the attention of the court. Moreover, if a court rejects the specific protection requested by the defendant, but a

significant risk of improper punishment nevertheless exists, then some other adequate protection must be provided. 127 S. Ct. 1065 ("[A] court, upon request, must protect against the risk . . . federal constitutional law obligates them to provide *some* form of protection in appropriate cases.") (emphasis in original).

B. The Oregon Supreme Court's Sole Focus On Jury Instructions Misinterprets, and Improperly Narrows, Williams II.

The Oregon Supreme Court held that Philip Morris' request for protection from unconstitutional punishment, in anticipation of this Court's holding in *Williams II*, was forfeited because a jury instruction Philip Morris submitted was not "correct in all respects." It then held that, the requested instruction having been properly denied, no other instruction, review, protection, or remedy was required by the Constitution or *Williams II* because all other aspects of its prior decision "lie outside the scope of the Supreme Court's remand." *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1263-64 (2008). The court took this position despite the fact that, in upholding the massive punitive damages judgment in its prior decision, it improperly had "adjudicated" the hypothetical claims of nonparties and approved punishment for their assumed aggregate harm:

> Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill, some would die, Philip Morris's deceit thus would, naturally and inevitably, lead to

> significant injury or death. . . . Every smoker tricked by its scheme, even those who never got ill, kept buying cigarettes – taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies.

Williams v. Philip Morris Inc., 127 P.3d 1165, 1177 (2006). Of course, there had been no evidence, and certainly no finding by the jury, that a single person other than Mr. Williams ever had been "tricked" by Philip Morris into believing that smoking was safe or had continued smoking for that reason. The assumption that Philip Morris' conduct actually had caused injury to many other persons, and the approval of punishment for their hypothetical aggregate harm, is exactly the constitutional violation that this Court first suggested in *State Farm*, and expressly identified in *Williams II*.

Thus, the Oregon Supreme Court itself indisputably violated the constitutional mandate of *Williams II*, but held that no remedy was required because Philip Morris' requested instruction had been properly denied by the trial court. This interpretation of *Williams II* misperceives the nature and scope of the constitutional principle announced, and the courts' obligation to enforce that principle and protect parties from its violation.

The Oregon Supreme Court is not alone in its myopic focus on a jury instruction as the sole constitutional protection required by *Williams II*. A number of other courts have interpreted *Williams II* as establishing a right to a jury instruction, if requested, and nothing more. *See, Buell-Wilson v. Ford Motor*

Co., 160 Cal. App. 4th 1107, 1172, 73 Cal. Rptr. 3d 277, 330 (2008), *rev. granted/briefing deferred*, 2008 WL 2892940 (Cal. July 9, 2008); *Grefer v. Alpha Technical*, 965 So. 2d 511, 577-78 (La. Ct. App. 2007) (denying new trial because no nonparty harm instruction was requested, even though the defendant objected to the *admission* of voluminous evidence of harm allegedly caused to nonparties that the court recognized was "irrelevant and, more than likely, confused the jury, contributing to its exorbitant punitive damage award."); *Flax v. DaimlerChrysler Corp.*, No. M2005-01768-SC-R11-CV, 2008 WL 2831225 (Tenn. July 24, 2008) (denying new trial based on improper punishment for nonparty harm, because defendant did not appeal denial of jury instruction, even though it did appeal *admission* of evidence of nonparty harm that court found was improperly admitted).

This narrow limitation of *Williams II* to a jury instruction reflects a fundamental misunderstanding of this Court's distinction between considering nonparty harm on the issue of reprehensibility and punishment for that harm. In *Williams II*, this Court twice described the potential relevance of evidence of harm to nonparties to the issue of punitive damages. Both times, the Court said that harm to nonparties might help the jury determine whether the conduct that harmed the plaintiff *risked* injury only to the plaintiff or to many persons or the general public. 127 S. Ct. at 1064 ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible . . . "); 127 S. Ct. at 1065 ("[W]e recognize that conduct

that risks harm to many is likely more reprehensible than conduct that risks harm to only a few . . . [a]nd a jury . . . may take this fact into account in determining reprehensibility.") It was this assessment of the scope of the risk that the Court found relevant to reprehensibility – not the alleged, but unproven, harm itself.[2]

State Farm held that courts may not adjudicate the hypothetical claims of nonparties "under the rubric of reprehensibility" or punish for aggregate harm, rather than the harm to the plaintiff. 538 U.S. at 423. *Williams II* affirmed this basic due process principle. 127 S. Ct. at 1063 ("[A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge . . . How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims.")

Thus, adjudicating the hypothetical claims of nonparties, and their assumed "aggregate harm", violates due process in assessing reprehensibility, just as in "calculating punitive amount." Indeed, because reprehensibility is the primary factor in calculating punitive amount, directly adding alleged harm to nonparties to reprehensibility, and increasing punishment accordingly, would be the precise manner

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[2] The Court did later refer to "taking account of harm caused others under the rubric of reprehensibility" 127 S. Ct. at 1065, but the Court already had explained what it meant by that in the passages quoted above.

in which a court or jury would punish "directly" for harm to nonparties. If *Williams II* allowed that, then the accusation of the dissenters that the Court's distinction was meaningless would be valid. 127 S. Ct. at 1067 ("When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant – directly – for third-party harm.") (Stevens, J., dissenting.)

Properly understood, however, the distinction between permissible use of evidence of harm to nonparties to show risk, and impermissible use of unproven harm to increase punishment, is critical to effective enforcement of the basic due process principle announced in *Williams II*. In many cases seeking punitive damages, the fact that the defendant's conduct, if wrongful, created risk to many persons or the general public, rather than just the plaintiff, will be apparent from the conduct itself – e.g., the design of a mass produced product found to be defective, or the illegal discharge of dangerous pollutants into the atmosphere or ground water. In such cases, where the nature of the risk, and its proper relevance to reprehensibility, is apparent from the conduct itself, the invocation of alleged harm to nonparties may serve no proper purpose, and, instead, create an "unreasonable and unnecessary" risk of unconstitutional punishment, regardless of what jury instructions are given.

In this case, the Oregon Supreme Court's express reliance on unproven aggregate harm to nonparties in upholding the punitive damages award created "an unreasonable and unnecessary risk" of unconstitu-

tional punishment – indeed, it made it certain. The idea that correction of the Oregon Supreme Court's own constitutional error, regardless of the instructions requested or given below, "lies outside the scope" of *Williams II's* directive cannot be squared with either the constitutional principle involved, or that decision's express holding.

II. THE OREGON SUPREME COURT'S PURPORTED PROCEDURAL RULE IS NOT AN INDEPENDENT AND ADEQUATE GROUND FOR ITS DECISION.

The erroneous interpretation of *Williams II* by the Oregon Supreme Court is apparent in its holding that Philip Morris forfeited all remedies for unconstitutional punishment because its proposed jury instruction was not "correct in all respects." Regardless of whether the requested instruction was correct in all respects, the request itself was sufficient to bring the constitutional issue to the attention of the court and invoke the general principle long recognized by this Court:

> In determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review.

Douglas v. State of Alabama, 380 U.S. 415, 422 (1965); *accord, Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990)

(when the constitutional violation was raised by a motion to dismiss, the failure to request a protective instruction did not waive the federal right).

Indeed, in its prior opinion upholding the punitive damages award, the Oregon Supreme Court had the constitutional principle firmly in mind in ruling on the propriety of Philip Morris' requested instruction, rejected that principle, and then violated it by using hypothetical harm to nonparties to justify punishment that dwarfed the compensatory damages. 127 P.3d at 1175-77. That court's holding that any remedy for this violation was waived by the failure to request a "correct in all respects" jury instruction improperly narrows, and diminishes, the constitutional principle announced in *Williams II*.

A state law ground that rests on a misinterpretation of federal law is not an independent and adequate state ground for decision. *Smith v. Texas*, 127 S. Ct. 1686, 1690 (2007) ("The requirement that Smith show egregious harm was predicated, we hold, on a misunderstanding of the federal right Smith asserts; and we therefore reverse."); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1984) ("[W]hen resolution of the state procedural law question depends on a federal constitutional ruling, the state law prong of the court's holding is not independent of federal law . . . "); *see also, Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (state court's holding that no tax refund was required by state law was not "independent and adequate" where it was based on erroneous conclusion that federal decision was not retroactive).

The Oregon court's own violation of *Williams II* by approving a huge punitive damages award based on the supposed aggregate harm to nonparties, 127 P.3d at 1177, was entirely independent of the jury instructions requested or given in the trial court. That appellate error could not be cured by a jury instruction and, therefore, could not be waived by a purported failure to request a jury instruction.

Moreover, the Oregon Supreme Court's application of the "correct in all respects" rule serves no legitimate state interest. As applied here, it amounts to a rule that a proposed jury instruction correctly addressing a distinct topic – that is, one that normally would be given – will be denied if it is printed on the same piece of paper as an instruction addressing a different topic that is incorrect in some way. This rule smacks of similar discretionary rules of "pointless severity" that have been trotted out to deny a newly recognized federal right, which this Court regularly has found inadequate to deny relief.

Indeed, the Oregon court's rule bears a striking similarity to the purported rule applied by the state court in *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288 (1964). There the Alabama Supreme Court refused to consider valid federal claims because they allegedly had been argued "together" with other invalid claims. This Court had no problem seeing through this purported ground for decision: "The Alabama courts have not heretofore applied their rules respecting the preparation of briefs with the pointless severity shown here." 377 U.S. at 297. The pointless severity of the Oregon Supreme Court's procedural rule, applied only after this Court recognized the

constitutional right it had rejected, deserves the same fate.

This Court has consistently refused to find such purported procedural rules adequate to deny federal rights that have been clearly raised. *See,* e.g., *James v. Kentucky*, 466 U.S. 341 (1984) (defendant's right to constitutionally required jury instruction not barred because he called it an "admonition"); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (appeal claiming race discrimination not barred for failure to give opposing counsel a "reasonable opportunity" to review transcript when opposing counsel actually reviewed and approved the transcript); *Douglas v. Alabama*, 380 U.S. 415 (1965) (constitutional challenge to admission of confession not barred because defendant, after objecting three times, failed to object to each individual question and answer as confession read to the jury); *Staub v. Baxter*, 355 U.S. 313 (1958) (challenge to the constitutionality of an entire ordinance not barred because plaintiff failed to challenge each section individually).

The result here should be the same. The highly discretionary rule invoked by the Oregon Supreme Court with unprecedented and pointless severity, based on an erroneously narrow view of *Williams II*, is not an adequate ground to deny the important constitutional right that Philip Morris amply and timely raised.

CONCLUSION

The Oregon Supreme Court's decision should be reversed and a new trial granted for the plain constitutional violation that occurred in this case.

Respectfully submitted,

Francis R. Ortiz
Counsel of Record
Robert W. Powell
Dickinson Wright PLLC
500 Woodward Avenue
Suite 4000
Detroit, MI 48226
(313) 223-3500
fortiz@dickinsonwright.com

Jan S. Amundson
Quentin Riegel
National Association of
Manufacturers
1331 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-3000

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF ON BEHALF OF NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SHEILA L. BIRNBAUM
Counsel of Record
DOUGLAS W. DUNHAM
ELLEN P. QUACKENBOS
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000

Attorneys for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the National Association of Mutual Insurance Companies (NAMIC) is a national trade association representing companies writing property and casualty insurance in every state and jurisdiction of the United States. NAMIC has more than 1,400 member companies that underwrite 43 percent ($196 billion) of the property/casualty insurance premiums in the United States. NAMIC members account for 44 percent of the homeowners market, 38 percent of the automobile market, 39 percent of the workers' compensation market, and 31 percent of the commercial property and liability market. NAMIC benefits member companies through advocacy, public policy and member services. NAMIC regularly appears in judicial proceedings as an *amicus* to inform courts about the implications of legal developments for its members.

In this case, this Court has granted certiorari on the question of whether the Oregon Supreme Court acted within its power and discretion when it chose to disregard this Court's mandate to apply the standard this Court had set forth in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007), and instead held that Philip Morris had procedurally defaulted under state law and had forfeited its claim of constitutional error in the punitive damages jury instructions that were the subject of this Court's opinion.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* NAMIC states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have given blanket consent to the filing of all *amicus* briefs in this case, in letters of consent filed with the Clerk of this Court.

Amicus and its member insurance companies have a substantial interest in issues relating to punitive damages. This case, in addition to the specific question presented, necessarily also raises the question as to the appropriate procedures on remand. This is a significant question for NAMIC's members and one that will surely continue to arise in punitive damages cases, thus warranting guidance from this Court. NAMIC respectfully submits that, in a case where the jury's verdict has been affected by a constitutional error in jury instructions in a manner and to an extent which is by its nature unknowable, the defendant is entitled as a matter of due process to a retrial. Moreover, depending on the nature of the case, the new trial should in some instances involve a full re-examination by the new jury of both underlying liability issues and punitive damages issues.

SUMMARY OF ARGUMENT

The Court should reverse the Oregon Supreme Court's finding of procedural default and should direct the Oregon Supreme Court to grant a new trial on both the issue of punitive damages and the underlying claims upon which the punitive award was based.

A new trial is a necessary remedy where the constitutional error at issue is an instructional error that goes to the basis and standard for the imposition of punitive damages. Such an error occurred in this case in the trial court's failure to give the jury instructions that would protect the defendant from the unconstitutional imposition of punitive damages punishing the defendant's conduct toward third parties who are strangers to the case. *See Williams*, 127 S. Ct. at 1065.

This Court has made clear that "[w]hen damages instructions are faulty and the verdict does not reveal the means by which the jury calculated

damages, '[the] error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict,'" because the "effect of the erroneous instruction is . . . unknowable." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 312 (1986) (second alteration original) (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 n.12 (1981)). This principle has repeatedly been applied when punitive damages jury instructions have been ruled erroneous. In such cases, remittitur to the constitutionally allowable maximum may result in an award that is higher than the jury would have awarded if properly instructed.

Amicus also submits that in certain circumstances, including the circumstances presented by this case, a full retrial of the underlying claims upon which the punitive damages award were based may be necessary. This is especially so where it cannot be determined what specific conduct the jury sought to punish and/or what specific conduct formed the basis for liability on the underlying claims. Here, the punitive award was based upon plaintiff's claim that her husband, Jesse Williams, relied upon misrepresentations by the defendant-appellant as to the safety and properties of cigarettes. Mr. Williams smoked for many years, and evidence was introduced at trial of many various representations in mass advertising and the media made over a period of decades by the defendant. It is not known and cannot be known which of these representations the original jury found to be actionable misrepresentations relied upon by Mr. Williams.

Accordingly, a retrial of only the punitive damages issue would leave the new jury to speculate as to what conduct by the defendant was actually adjudged tortious and on what conduct it should base a new punitive award. Such a procedure would fall foul of the now well established principle that punitive damages must be based upon a defendant's *wrongful* conduct toward the plaintiff. Without a new trial as to the underlying claims as well as of

the punitive damage claim, there is a substantial risk that a second jury may impermissibly punish conduct that the first jury did not find to be tortious.

I. REMITTITUR IS NOT A SUFFICIENT REMEDY FOR THE CONSTITUTIONAL ERROR IN THIS CASE, AND A NEW TRIAL IS WARRANTED

Remittitur is the established method by which a trial judge can correct a punitive damages award for excessiveness. *See, e.g., Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 593 (4th Cir. 1996). In most circumstances, however, remittitur will not cure a defective punitive damages jury instruction, and the appropriate remedy is a new trial.

"Remittitur is appropriate to reduce verdicts only in cases 'in which a properly instructed jury hearing properly admitted evidence nevertheless makes an excessive award.'" *Werbungs und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991) (citation omitted). It is not an appropriate remedy for excessive verdicts in cases where "'error has infected the jury's entire consideration" of the evidence on damages. *Id.* at 1027-28 (citation omitted).

Indeed, the United States Court of Appeals for the Ninth Circuit, citing this Court's earlier opinion in this case, held that a new trial on punitive damages was required where (as here) "the district court erred in failing to instruct the jury that it could not punish the defendants for conduct that harmed only nonparties." *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1017-18 (9th Cir. 2007) (citing *Williams*, 127 S. Ct. at 1065). The Ninth Circuit opined that, although "*Williams* suggests in passing that a panel may remedy this error either by granting a new trial or reducing the amount of

punitive damages," *Merrick*, 500 F.3d at 1017-18, remittitur "seems less appropriate where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount." *Id.* at 1018.

As this Court explained in a similar context, "[w]hen damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, '[the[error in the charge is difficult, if not impossible, to correct without retrial . . . .'" *Memphis Cmty. Sch. Dist.*, 477 U.S. at 312. Thus, when "[t]he effect of the erroneous instruction is . . . unknowable," the proper remedy is a new trial. *Id.* at 312-13. In the present case, there is no way of knowing what portion of the punitive award was intended to punish conduct towards third parties and no way of knowing the amount of punitive damages the jury would have imposed if properly instructed. It cannot be simply assumed that if properly instructed the jury would have decided to impose the maximum constitutionally allowable punishment – which is the number that remittitur would provide.[2]

The principle set forth by this Court in *Memphis Community School District* was already firmly established as long ago as this Court's opinion in *Hansen v. Boyd*, 161 U.S. 397 (1896). *See id.* at 411 ("[T]o avoid the granting of a new trial on account of error affecting a part thereof, [a Court may enter] a remittitur as to such erroneous part, when the court can clearly distinguish and separate the same."). *See also* 2 J.G. Sutherland, *Sutherland on Damages* § 459, at 1504 (4th ed. 1916) ("where the erroneous part of the damages found by the jury cannot be ascertained, and it is impossible to tell what the jury acted upon, or how they made up their verdict under

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[2] *See, e.g., Goddard v. Farmers Ins. Co.*, 179 P.3d 645, 670-71 (Or. 2008) (en banc); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 572 (Or. Ct. App. 2003).

the charge of the court, so as to correct the error and arrive at the amount they should have given, justice cannot be done by a remittitur").

Likewise, when courts have used remittitur in circumstances where the precise effect of an erroneous charge or other error on damages could not be ascertained, the courts have based remittitur not on the maximum damages the jury could have reasonably found, but upon the *lowest* amount which a jury could reasonably have awarded, recognizing that only so could it be ensured that the error was rendered harmless. As one treatise stated nearly a century ago:

> Where the court has made an erroneous ruling on the admission or exclusion of evidence as to the amount of damages, or has given an erroneous charge as to the measure of damages, it may be that it is impossible to say how much the jury would have awarded if no such error had been made. In such a case it would seem that a new trial upon the question of damages is necessary, unless the plaintiff is willing to accept the lowest amount which a jury could reasonably have awarded, if it had been uninfluenced by evidence which was improperly admitted, or if it had considered evidence which was improperly excluded, or if it had been properly instructed on the law.

A. Scott, *Fundamentals of Procedure in Actions at Law* 125 (1922) (footnote omitted); *see also, e.g., Chicago, R.I. & P. Ry. v. Batsel*, 140 S.W. 726, 729 (Ark. 1911) (adhering to the rule of remitting damages to a figure "'so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence, would, when properly instructed as to the law, allow plaintiff a less sum than that named'"); *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52-53 (1895) (setting remittitur at a figure

so low that "no injustice was done to the defendant" by the error at trial). In the context of punitive damages, remittitur to the *lowest* amount a reasonable jury could have awarded is not a practicable remedy as that amount is likely zero. However, these cases illustrate the inherent inadequacy of the remedy of remitting a punitive award to the maximum constitutional amount where instructional error is at issue – namely, there can be no assurance that the effect of the error has been corrected.

In short, the basic principle adhered to by this Court and others is that an instructional error affecting damages should be rendered harmless to the defendant, and where it cannot be made harmless by remittitur, a new trial is in order. Where, as here, the instructional error was constitutional and where, to the extent that error affected the amount of punitive damages awarded, it resulted in a taking of property from the defendant without due process, *see Williams*, 127 S. Ct. at 1060, the issue of the remedy for that error is also of constitutional dimensions.

II. IN THIS CASE THE APPROPRIATE REMEDY IS A NEW TRIAL ON PUNITIVE DAMAGES AND THE UNDERLYING CLAIMS

The determination whether a retrial limited to punitive damages would be fair must be decided case by case. *See McDonough v. City of Quincy*, 452 F.3d 8, (1st Cir. 2006); *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272-73 (5th Cir. 2000). Considerations which may require a retrial of the underlying claims as well as of the punitive damages claim include whether the award of compensatory damages may include some element of punishment for the defendant's reprehensibility, which could be duplicated in a retrial limited to punitive damages, *see McDonough*, 452 F.3d at 24-25, and whether the

verdict on punitive damages "is 'intertwined with [the jury's] view of the facts determining liability.'" *EEOC v. Stocks, Inc.*, 228 Fed. Appx. 429, 432-33 (5th Cir. 2007) (citation omitted); *accord Hardin*, 227 F.3d at 272-73. As this Court stated in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931), the propriety of granting a new trial on fewer than all of the issues in a case hinges on whether the issues to be retried are sufficiently "distinct and separable from the others that a trial of [those issues] alone may be had without injustice."

Where the issues of liability and punitive damages are "inextricably intertwined," "[i]f a district court were to retry only one of two such intertwined issues to a second jury, while maintaining the vitality of the first jury's findings on the other issue, it would cause confusion and uncertainty and, thus, an unfair trial." *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1256 (10th Cir. 1999).

In *Simone v. Golden Nugget Hotel & Casino*, 844 F.2d 1031, 1040-41 (3d Cir. 1988), the Third Circuit "interpreted the *Gasoline Products* standard to prevent determination of damages separate from liability when there is a complex or tangled fact situation." In affirming the trial court's decision to hold a new trial on both liability and damages on the plaintiff's false imprisonment claim in that case, the Third Circuit held that the "issues of liability and damages [were] interwoven warp and woof." *Id.* at 1041. The court stated:

> [I]t is not clear from the [first] jury's answers to interrogatories whether it attributed any of [the plaintiff's] physical injuries to the claim of false imprisonment. To calculate compensatory damages in a new trial, that jury would have to determine which, if any, of [the plaintiff's] injuries were incurred because of the false imprisonment. To do that, it would first have to find at what points the unlawful detention began and

> ended. Moreover, on the question of punitive damages, the jury would have to assess the conduct of the Golden Nugget to determine whether it acted with malice or in willful disregard of [the plaintiff's] rights.

Id.

In the case before the Court, although a second jury could perhaps be instructed by the trial court with regard to certain of the underlying findings by the first jury, instruction as to other, crucial issues could only be based upon speculation as to the basis for the first jury's verdict. Accordingly, maintaining the vitality of the first jury's finding as to liability and damages on plaintiff's misrepresentation claim, while asking a second jury to determine whether punitive damages should be imposed based upon that claim, would present the substantial risk of confusion, uncertainty and an unfair trial recognized by the court in *Morrison Knudsen*, 175 F.3d at 1256.

In this case, the issue of punitive damages is inextricably interwoven with all the circumstances giving rise to the plaintiff's harm. In particular, the evidence of the defendant's alleged misrepresentations in this case spanned several decades. [3] Furthermore, during most of that time period, federal law required public disclosures on every package of cigarettes, and the detail and content of these disclosures changed from year to year. Accordingly, in reaching a verdict on plaintiff's fraud

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[3] *See, e.g., Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-69 (Or. 2006) (describing the claim against defendant as based "on a 40-year publicity campaign by Philip Morris and the tobacco industry"), *vacated*, 127 S. Ct. 1057 (2007). In addition, the jury's finding that Mr. Williams' own negligence was a cause of his damages, *see* Joint Appendix 43a, may raise further questions about precisely what conduct at issue in the misrepresentation claim was deemed by the jury to have caused damage to Mr. Williams.

claim, the first jury was tasked with sifting through evidence relating to a multitude of different alleged misrepresentations, evaluating the circumstances surrounding each, and deciding as to Mr. Williams' reasonable reliance, or lack thereof. It is impossible to ascertain the jury's findings in this regard. Thus, not only is it impossible to know from the jury's verdict what portion, if any, of the punitive award the jury intended to punish conduct towards third parties, but it also cannot be known from the jury's verdict which part or parts of the conduct at issue were found by the jury to be tortious as to the plaintiff here and formed the basis for the jury's finding of liability on plaintiff's underlying claim.

In these circumstances, it is not possible for a second jury to identify – and limit any award of punitive damages to – the conduct for which the original jury imposed tort liability. *Cf. Hardman v. AutoZone, Inc.*, 214 Fed. Appx. 758, 765-66 (10th Cir. 2007) (affirming district court's grant of a full retrial, rather than a trial on punitive damages only, because "a second jury tasked only with having to determine a new punitive damage award would unfairly be required to 'speculate as to what AutoZone conduct formed the basis of the first jury's verdict of liability and award of nominal damages'"). Under this Court's earlier decision in this case, it is only the conduct found by the jury to have harmed plaintiff in this case that can, as a constitutional matter, be punished by the imposition of punitive damages. *See Williams*, 127 S. Ct. at 1065.

Accordingly, a new trial on liability as well as punitive damages is necessary, and this Court should exercise its power to direct the grant of a new trial. *See* 28 U.S.C. § 2106 ("The Supreme Court . . . may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further

proceedings to be had as may be just under the circumstances.").

CONCLUSION

For all the foregoing reasons, *amicus curiae* respectfully submits that the Court should reverse and remand, with instructions that a new trial be held.

Respectfully Submitted,

Sheila L. Birnbaum*
Douglas W. Dunham
Ellen P. Quackenbos

**Counsel of Record*
Skadden, Arps, Slate,
Meagher & Flom LLP
Four Times Square
New York, NY 10036
(212) 735-3000

AMICUS CURIAE BRIEF

No. 07-1216

In the

Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Oregon Supreme Court

BRIEF OF THE STATES OF OREGON, DELAWARE, MARYLAND, MISSISSIPPI, NEW MEXICO, SOUTH CAROLINA, TENNESSEE AND WYOMING AMICI CURIAE IN SUPPORT OF RESPONDENT

HARDY MYERS
ATTORNEY GENERAL OF OREGON
PETER SHEPHERD
DEPUTY ATTORNEY GENERAL
*MARY H. WILLIAMS
SOLICITOR GENERAL
JANET A. METCALF
ASSISTANT ATTORNEY GENERAL
400 Justice Building
Salem, Oregon 97301
(503) 378-4402

Counsel for Amicus Curiae

**Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

This case has been before this Court twice before. When the case was last here, this Court decided that the Oregon Supreme Court, in holding that the state trial court did not err in rejecting one of petitioner's requested jury instructions, had misinterpreted federal constitutional requirements. The Court remanded so that the state supreme court could apply the standard that this Court had set forth. *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940, 951 (2007). On remand, the state court decided that other aspects of petitioner's requested jury instruction were incorrect as a matter of state law. The court, therefore, affirmed, invoking the state-law rule that the failure to give a requested jury instruction is error only if the requested jury instruction is "'clear and correct in all respects, both in form and in substance, and * * * altogether free from error.'" (Pet. Cert., App. 14a, quoting *Beglau v. Albertus*, 272 Or. 170, 179, 536 P.2d 1251 (1975) (additional citations omitted).

In this setting, the question presented is whether the state court permissibly could consider and base its decision on this state-law ground and whether the state-law ground is an independent and adequate one.

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INTEREST OF THE STATE *AMICI*

This case presents two issues that are of great interest and importance to the States. Those issues are identified below. The State of Oregon also notes that, by statute, it is entitled to a portion of the punitive damages award in this case, to be applied to the State's Criminal Justice Injuries Compensation Account. Or. Rev. Stat. § 31.735. Eight other States also have statutes providing that some portion of punitive damages awards go not to the plaintiff, but to the State to be used for public purposes. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 616-17 (1996) (Ginsburg, J., dissenting) (appendix).

The first of the issues presented here that is of particular significance to the States involves the authority of state courts, on remand from this Court, to consider whether there are state procedural or substantive bars to reaching and deciding a federal constitutional issue. Petitioner argues that, when this Court determines that a state court has erred in its understanding of federal law and remands to the state court for it to apply the correct federal standard, the state court is absolutely prohibited from considering whether principles of state law or procedure bar consideration of the merits of the federal issue. The rule that petitioner advances would preclude a state court from relying on such a ground for decision, even when it is based solely on state law. Such a rule would unduly limit state courts, and would force the unnecessary decision of federal constitutional issues both by state courts and possibly by this Court.

The second important issue presented by this case is the test that should apply when determining whether a state-law substantive or procedural ground for decision is an independent and adequate state ground. Petitioner argues for a very narrow interpretation of that doctrine. The States, which often litigate the doctrine in a variety of contexts, notably in federal habeas corpus actions, have a strong interest in the continued vitality of a broad independent-and-adequate state-law doctrine, one that respects the authority of the States and of state courts.

SUMMARY OF ARGUMENT

This Court cannot review a federal constitutional issue if a state court's decision is based on an independent and adequate state-law ground. That doctrine is rooted in principles of federalism and is based on the respect that is due to state courts in fashioning their own rules of procedure. Petitioner seeks to undercut the doctrine in two significant ways. In petitioner's view, once this Court decides that a state court has misunderstood federal constitutional law and has remanded a case to state court, the state court is prohibited from deciding that an independent state-law ground bars review of the federal issue. Petitioner also suggests that a state-law ground can be adequate only when its application in a particular case flows directly from some earlier decision that is essentially on all fours.

Either point, if accepted by this Court, would unduly limit the independent-and-adequate state law doctrine. Under this Court's case law, when this Court decides a federal constitutional issue and re-

mands to state court, the state court remains free to consider whether independent state-law grounds ultimately bar a decision on the merits of the federal claim. The state court cannot take any action that is inconsistent with this Court's decision, but it can explore alternate grounds of decision that are based on state law. Any rule precluding such consideration would undermine the authority of state courts to shape their own procedures, and would force the unnecessary decision of federal constitutional issues.

This Court's jurisprudence regarding the independent-and-adequate state law doctrine also does not require that, for a state-law bar to be adequate, its application in a particular case must flow more or less directly from some prior decision that is essentially on all fours. It is enough if the application of the state-law requirement is reasonably predictable.

The independent-and-adequate state law doctrine plays a particularly significant role in federal habeas corpus cases. Any dilution of the doctrine would impact untold numbers of such cases.

ARGUMENT

As noted, when this case was last before this Court, the Court determined that the Oregon Supreme Court had misinterpreted federal law and "applied the wrong constitutional standard," and the Court remanded so that the state court could "apply the standard [the Court] ha[d] set forth." *Philip Morris USA v. Williams*, 166 L. Ed. 2d at 951. On remand, the Oregon Supreme Court determined that a state procedural rule barred review of the federal

constitutional issue. Oregon appellate practice – like the practice of many States — requires that error be assigned to specific rulings of the state trial court. Or. R. App. Proc. § 5.45. On appeal in this case, petitioner assigned error to the trial court's failure to give its requested jury instruction, but not to the instructions that the trial court gave. Because petitioner had not assigned error to the instructions actually given, when it tried to challenge those instructions before the Oregon Supreme Court, that court held that the issue had not been properly preserved before the state court of appeals. (Pet. Cert., App. 52a) (citations omitted).

Oregon procedure also has long provided that, in order for the failure to give a requested instruction to be error, the instruction must be "correct in all respects." (Pet. Cert, App 14a, 52a) (citations omitted). Invoking that rule in this case, the Oregon Supreme Court determined that the trial court had not erred in refusing to give petitioner's requested instruction. "[E]ven assuming" that the requested instruction "clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly." (Pet. Cert., App. 21a). "Accordingly, the trial court did not err in refusing to give it." *Id.*

A. Petitioner's proposal that, on remand from this Court, state courts cannot consider alternative bases for decision under state law, is not supported by this Court's case law, would unduly hamstring state courts, and would lead to the unnecessary decision of federal constitutional issues.

Before this Court, petitioner argues that the state court could not reach the issue of whether, as a matter of state law, petitioner's requested instruction was not correct in all respects. Petitioner first contends that the state court was prohibited from considering the "correct in all respects" rule because it was implicit in this Court's earlier decision that the federal constitutional issue had been properly preserved. Petitioner argues that state courts are not free to reexamine the premises that underlie this Court's decisions, even if those premises involve matters of state law and were not expressly considered or decided by this court. (Pet. Br. 18). Petitioner also argues that such implicit premises amount to the "law of the case." (Pet. Br. 21).

The rule that petitioner proposes is not supported by this Court's case law, would unduly hamstring state courts on remand from this Court, and would lead to the unnecessary decision of federal constitutional issues. This Court's implicit assumption that the federal constitutional issue had been properly raised and preserved in state court is not the law of the case. The Court did not decide the issue. *United States v. Hatter*, 532 U.S. 557, 566 (2001); *Quern v. Jordan*, 440 U.S. 332, 347 n. 18 (1979). And, while

this Court's mandate "'is controlling as to matters within its compass, on the remand a lower court is free as to other issues.'" *Quern*, 440 U.S. at 347 n. 18, quoting *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939) (additional citation omitted). *See also Georgia Ry & Elec Co. v. City of Decatur*, 297 U.S. 620, 623 (1936) (state court free to reinterpret state statute on remand); *Konigsberg v. State Bar of California*, 366 U.S. 36, 42-43 (1961) (state court free to consider additional issue of state law on remand).

In this case, the state court simply exercised that freedom. It recognized that, under a state-law procedural rule, the failure to give petitioner's requested jury instruction was not error, even if the instruction "clearly and correctly articulated the standard required by due process[.]" (Pet. Cert., App. 21a).

The fact that the state court based its decision on an alternative ground under state law is what distinguishes this case from the ones cited by petitioner. In both *Stanton v. Stanton*, 429 U.S. 501 (1977), and *Yates v. Aiken*, 484 U.S. 211 (1988), on remand the state courts reached decisions that were at odds with this Court's earlier decision, and that were not simply based on an alternative ground. In *Sibbald v. United States*, 37 U.S. 488, 492 (1838), similarly, a state surveyor refused to comply with this Court's mandate. In *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240, 243 (1959), the state took a position that was directly contrary to the position that it had taken earlier in the litigation, and this Court held that the state was bound by its earlier position. And, in *Smith v. Texas*, 550 U.S. 297, 167 L. Ed. 2d 632, 644 (2007), the flaw

in the state court's decision on remand was that it was based on a misinterpretation of *federal* law.

In sum, the strict and inflexible rule suggested by petitioner would preclude state courts from reexamining on remand any premise that underlies this Court's decision, even when such a premise is based on a matter of state law. That rule is unwarranted, would unduly limit the authority of state courts, and would lead to the unnecessary consideration of federal constitutional issues. This Court should reject any rule that would absolutely prohibit state courts from considering on remand issues of state law that may bar consideration of federal constitutional issues.

B. In order for a state-law ground to be adequate, there need not be an earlier state court decision that is essentially indistinguishable; it is enough if the application of state law in the particular case is reasonably predictable.

Petitioner also argues for a very limited application of the independent and adequate state law doctrine. In petitioner's view, the doctrine should apply only when a prior state court decision is essentially indistinguishable from the present one. (Pet. Br. 13, 34-35, 40). Petitioner proposes an unduly cramped view of the doctrine, one that undermines the authority of state courts.

As this Court has recognized, "[t]he adequate-state-ground doctrine accords respect to state courts as decisionmakers by honoring their modes of procedure." *Howlett v. Rose*, 496 U.S. 356, 369 n. 16 (1990).

The purpose of the doctrine is "to accord appropriate respect to the sovereignty of the States in our federal system." *Ulster County Court v. Allen*, 442 U.S. 140, 154 (1979). For that reason, "[w]hen a state court refuses jurisdiction because of [or bases its decision on] a neutral state rule regarding the administration of the courts, [this Court] must act with utmost caution before deciding that it is obligated to entertain the claim." *Howlett*, 496 U.S. at 372 (citations omitted).

> The general rule "bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Hart, 54 Colum L. Rev at 508; *see also Southland Corp. v. Keating*, 465 U.S. 1, 33 (1984) (O'Connor, J., dissenting); *FERC v. Mississippi*, 456 U.S. at 774 (opinion of Powell, J). The States thus have great latitude to establish the structure and jurisprudence of their own courts.

Id. (additional citations omitted).

Petitioner's suggested approach would greatly dilute the respect afforded to state courts in matters of their own procedure and would rein in the "great latitude" to be given to state courts in such matters. Such an approach is at odds with this Court's case law. And, to reiterate, any dilution or contraction of the independent-and-adequate state law doctrine would severely impact the States, particularly in federal habeas corpus cases, which are legion and where the doctrine is often litigated.

"The accepted rule is that a state court establishes an independent and adequate state ground, barring Supreme Court review, by refusing to consider a federal question that was presented by means that do not comply with established and reasonable state procedures." Wright, Miller, and Cooper, 16B *Federal Practice and Procedure* § 4022 at 343 (2d ed 1996). To be independent and adequate, state-law grounds must not be "plainly untenable," *Ward v. Board of Cty. Commrs. of Love City*, 253 U.S. 17, 22 (1920), they cannot be entirely novel, *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958), they cannot amount to "an arid ritual of meaningless form," *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958), and the state-law ground must find "fair or substantial support" in state law and practice. *New York Times Co v. Sullivan*, 376 U.S. 254, 264 n. 4 (1964).

But the state-law bar need not, as petitioner suggests, have been applied previously in a decision that is almost precisely on point. Instead, unless there is good reason to suspect that the state court has invoked a state-law ground as a subterfuge or where the application of state law is truly unexpected and unforeseeable, it is sufficient if, as a general matter, the state-law rule is "'consistently or regularly applied.'" *Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989), quoting *Johnson v. Mississippi*, 486 U.S. 578, 589 (1988). *See also Jimmy Swaggert Ministries v. Calif. Bd. Equalization*, 493 U.S. 378, 399 (1990) (state-law bar to decision of federal issue is "adequate" if "in general" it is not applied irregularly, arbitrarily, or in an inconsistent manner).

That the "correct-in-all-respects" rule invoked by the state Supreme Court in this case generally is applied consistently and predictably is what distinguishes this case from one of the cases heavily relied on by petitioner. In *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 296 (1964), it was "crystal clear" to this Court that the state-law rule applied by the state court could not even "reasonably be deemed applicable in th[e] case." If a state-law rule is not applicable at all in a case, it cannot be said that its application has been predictable and consistent.[1]

The other cases relied on by petitioner also are distinguishable. In *Osborne v. Ohio,* 495 U.S. 103, 123 (1990), the petitioner had preserved one of his federal constitutional claims in a motion to dismiss, although he had not requested a related jury instruction. In contrast here, even if petitioner raised its due process claim by arguing that part of its jury instruction comported with and accurately described federal law, nevertheless appellate reversal based on that claim is barred by the state-law rule that refusing to give a requested instruction is not error on appeal unless the instruction is correct in all respects. In order for petitioner's requested jury instruction to have

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[1] The consistency and predictability with which the "correct in all respects" rule is applied is indicated by the fact that, contrary to petitioner's assertion, the rule also was invoked by the state court when the case was before that court earlier in 2006. (Pet. Cert., App. 51a-52a). In 2006, however, the state court found a different flaw in petitioner's requested jury instruction.

passed by that requirement, the trial court would have been forced to edit it and to delete the portions of it that are incorrect as a matter of state law, which contravenes the purpose of the "correct-in-all-respects" rule.

In *Lee v. Kemna*, 534 U.S. 362, 365-66 (2002), the criminal defendant moved for a continuance orally when circumstances suddenly changed and his alibi witnesses were missing, but he failed to put the request in writing. Under the circumstances, he had no reasonable opportunity to comply with the state-law procedural requirement. In contrast here, all petitioner had to do was to submit to the trial court separately the individual legal points included in its requested jury instruction, rather than combining them all in one lengthy requested instruction.

Petitioner also contends that the "correct-in-all-respects" rule is not an independent and adequate state ground because in *State v. George*, 337 Or. 329, 97 P.3d 656 (2004), the Oregon Supreme Court held that – even though the defendant's requested instruction was not entirely correct — the trial court had erred in failing to instruct the jury on the consequences of the defendant being found guilty except for insanity. In that case, however, a state statute affirmatively placed on the trial court the responsibility to instruct the jury, "without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." *George*, 337 Or. at 339. No such affirmative statutory obligation applies in this case. Moreover, although the *George* court noted, as an alternative

ground of decision, that crafting a correct instruction would have been an "exercise in futility," *id.*, and although petitioner argues that also would have been true in this case, the state Supreme Court disagreed that would have been true here. The court rejected petitioner's "assertion that any further or different effort by it respecting the instruction would have been 'futile.'" (Pet. Cert., App. 16a n. 5). "The record throughout belies that idea: The trial judge was solicitous of, and at pains to consider, the views of both parties respecting instructions." *Id.* Thus, *George* is readily distinguishable from this case. No statute required the trial court to give any particular instruction on punitive damages, even absent a legally correct request, and it would not have been futile for petitioner to have sought to craft an instruction that was correct in all respects.

In sum, petitioner urges an unduly crabbed and ungenerous view of the doctrine of the independent and adequate state ground. In order for a state-law bar to be adequate in a particular case, it need not result directly from application of some prior case that is essentially on all fours. It is instead enough if the application of the bar is reasonably predictable and foreseeable. The Court should not accept petitioner's invitation to strictly limit the independent-and-adequate state-ground doctrine.

CONCLUSION

The *amici* States urge this Court to decline petitioner's invitation to curb the independent-and-adequate state-law doctrine. The doctrine is rooted in federalism and in the respect that is owed to the

States and to state courts. Restricting the doctrine undermines those principles, limits the authority of States and of state courts, and would lead to the unnecessary resolution of federal constitutional issues.

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
Assistant Attorney General
Counsel for Amicus Curiae
State of Oregon

October 9, 2008

APPENDIX

APPENDIX A

LIST OF THE AMICI CURIAE

State of Delaware
Joseph R. "Beau" Biden, III
Attorney General of Delaware
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801

State of Maryland
Douglas F. Gansler
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202-2202

State of Mississippi
Jim Hood
Attorney General of Mississippi
Department of Justice
P.O. Box 220
Jackson, Mississippi 37205-0220

State of New Mexico
Gary King
Attorney General of New Mexico
P.O. Drawer 1508
Santa Fe, New Mexico 87504-1508

State of South Carolina
Henry D. McMaster
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

State of Tennessee
Robert E. Cooper, Jr.
500 Charlotte Avenue
Nashville, Tennessee 37243

State of Wyoming
Bruce A. Salzburg
Attorney General of Wyoming
State Capitol Building
Cheyenne, Wyoming 82002

AMICUS CURIAE BRIEF

No. 07-1216

In The

Supreme Court of the United States

PHILIP MORRIS USA, INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE OREGON TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

MEAGAN A. FLYNN
(Counsel of Record)
PRESTON BUNNELL & FLYNN, LLP
1500 SW First Avenue
Suite 770
Portland, OR 97201
(503) 227-5445
Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF OF THE OREGON TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The Oregon Trial Lawyers Association ("OTLA") respectfully submits this Amicus Curiae brief in support of Respondent. Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this Amicus Curiae brief.[1]

INTEREST OF AMICUS CURIAE

OTLA is a statewide, non-profit association of approximately 700 attorneys who qualify for membership through a commitment to the principles of fundamental fairness, trial by jury and the civil justice system and by primarily representing plaintiffs in cases involving personal injury, civil rights, employment, workers' compensation and business tort litigation. One of the objectives of OTLA, as stated in its Constitution, Article II, is "especially to advance the cause of those who are damaged in

[1] Letters evidencing the parties' consent have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of the Amicus Curiae's intention to file this brief.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

person or property and who must seek redress therefore."

The purpose of this amicus brief is to provide context for this Court to assess the Petitioner's assertion that the Oregon Supreme Court applied a procedural rule that "is neither firmly established nor regularly followed." OTLA urges this Court to continue to respect the right of state courts to enforce well-established rules of procedure that serve "the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *See Osborne v. Ohio,* 495 U.S. 103, 123 (1990).

SUMMARY OF THE ARGUMENT

For nearly a century, the Oregon Supreme Court has repeatedly and consistently enforced the rule that refusal to give a requested instruction is not error if the proposed instruction is incorrect in any respect. The court predictably followed that rule in carrying out this Court's remand instruction to consider whether the trial court's refusal to give Petitioner's Proposed Jury Instruction Number 34 required a new trial. Petitioner's allegation that the rule was merely "a pretext" invoked by the Oregon Supreme Court "in order to evade this Court's directions" misinterprets Oregon law and falsely impugns the integrity of the Oregon court.

ARGUMENT

I. The Procedural Rule Enforced Below by the Oregon Supreme Court Is Well-Established and Regularly Followed.

The Oregon Supreme Court long ago put Oregon lawyers on notice that it is the responsibility of the parties – not of the trial judge – to correctly fashion desired jury instructions. In *Sorenson v. Kribs,* 161 P. 405, 409 (1916), the appellant had requested a jury instruction that "may have been technically incorrect," and contended that the requesting of a jury instruction on an issue that was properly a matter for instruction imposed a duty on the trial court "so to modify the language suggested as correctly to state the law applicable to the issue involved." The Oregon Supreme Court rejected the argument, adopting, instead, the position it found to be supported by the "great weight of authority":

> "In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. **If the instruction, as requested, is objectionable in any respect, its refusal is not error.**" (quoting *1 Blashfield's Ins. to Juries* (2d Ed.) § 175, p. 402) (emphasis added).

Throughout the ensuing nine decades, the Oregon Supreme Court continued to remind members of the Oregon bar that they bear the sole responsibility

for crafting accurate jury instructions, and indeed to emphasize that adding a single inaccurate proposition to a proposed instruction that contains other, accurate statements of the law will taint the entire instruction. *See, e.g., Samchuck v. Insurance Co. of North America,* 179 P. 257, 260 (1919) ("In a long instruction like this one the court is not required to separate the good from the bad. It is well settled that before error can be based upon the refusal of an instruction, the whole instruction, as applied to the case, must be good law and accurately stated."); *Naftzger v. Henneman,* 185 P. 233, 235 (1919) ("[W]here a requested instruction contains an erroneous proposition, the court is not bound to separate the chaff from the wheat, and give that part of the request which states the law correctly."); *Forrester v. Hauser Const. Co.,* 240 P. 873, 876 (1925) (no error in trial court's refusal to give a requested instruction that combined a proper statement of the law with another statement that was erroneous); *Diller v. Riverview Dairy,* 288 P. 401, 403 (1930) ("[E]rror cannot be predicated, aside from any rule of court, upon the refusal to give an instruction which does not clearly, concisely, and accurately cover the point in issue."); *Alt v. Krebs,* 88 P.2d 804, 806 (1939) (Trial court did not err in refusing to give instruction that correctly stated the law but "would likely have caused confusion" because "[e]rror cannot be predicated upon the refusal to give an instruction which does not clearly, concisely and accurately cover the point in issue."); *Hotelling v. Walther,* 148 P.2d 933, 935 (1944) (reiterating that Oregon rule is that recited in *Sorenson*: "In order to

entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error."); *Schultz v. Shirley,* 220 P.2d 86, 88 (1950) (The plaintiff's requested instruction "includes three different propositions, and if any one of them is improper or unwarranted under the law, the trial court is not required to segregate the wheat from the chaff and give the portion of the instruction that is proper."); *Denton v. Arnstein,* 250 P.2d 407, 417 (1952) ("The trial court may properly refuse a requested charge which is unintelligible, incomplete, or argumentative, or which might prove misleading or confusing to the jury."); *Wiebe v. Seely,* 335 P.2d 379, 393 (1959) ("[I]t is well settled that if a requested instruction is not altogether free from fault, the court need not give it."); *Ballou v. Blitz-Weinhard Co.,* 424 P.2d 225, 227 (1967) ("We need not cite authorities for the proposition that the court is not required to give a requested instruction if its substance, . . . is not free from fault."); *McCaffrey v. Glendale Acres,* 440 P.2d 219, 222 (1968) ("In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error." (quoting *Hotelling v. Walther,* 148 P.2d at 935)); *Brooks v. Bergholm,* 470 P.2d 154, 158 (1970)

(no error in trial court's refusal to give an instruction on a point of law on which the defendant "was entitled to an instruction . . . if properly requested" because "the instruction in the form in which it was requested was not free from fault"); *Owings v. Rose,* 497 P.2d 1183, 1188 (1972) ("The trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors."); *Beglau v. Albertus,* 536 P.2d 1251, 1256 (1975) ("It is fundamental that a request for an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and in substance, and unless it is altogether free from error"); *Hernandez v. Barbo Machinery Co.,* 957 P.2d 147, 151 (1998) (The trial court does not err in refusing to give a requested instruction "if the requested instruction is not correct in all respects."); *Bennett v. Farmers Ins. Co. of Oregon,* 26 P.3d 785, 795 (2001) ("However, the failure to give a requested instruction is not error if the requested instruction was not correct in all respects.")

The rule that trial counsel must offer instructions that are correct in all respects is procedural and neutral; it applies equally to plaintiffs and defendants, individuals and corporations, criminal and civil. *See State v. Reyes-Camarena,* 7 P.3d 522, 528 (2000) ("Because defendant's requested sympathy instruction, considered in its entirety, did not state the law correctly in all respects, the trial court did not err in refusing to give that sympathy instruction regardless of whether the instruction was correct in

part."); *State v. Quartier*, 247 P. 783, 784 (1926) ("A requested instruction is always properly refused, unless it ought to have been given in the very terms in which it was proposed.")

II. The rule of *Sorenson* is the only standard by which the Oregon Supreme Court evaluates challenges to the refusal of a particular jury instruction.

Petitioner, and amici supporting it, criticize the Oregon Supreme Court for holding petitioner to the requirement that a requested jury instruction must be correct in all respects rather than copying the holding of its decision in *State v. George*, 97 P.3d 656, 661 (2004). According to Petitioner, "the Oregon courts had long held that there is no need for counsel to re-submit a proposed instruction in 'completely correct' form if it is clear that such a submission would be rejected in any event," citing *George*. (Brief for the Petitioner at 13). That is not a correct statement of Oregon law. Although the defendant in *George* also proposed an instruction that the Oregon Supreme Court concluded failed to convey "a correct overall impression" of the law, that is where the analogy to the case at bar ends. In *George*, an Oregon statute required that, when a criminal defendant raises an insanity defense, the trial court "shall instruct the jury" regarding the statutory consequences for the defendant of a verdict of guilty except for insanity. 97 P.3d at 657. The trial court had refused to give the defendant's requested instruction on

this point of law **or** the Oregon Uniform Criminal Jury Instruction on the point of law because it believed it could not "give **any** instruction regarding the consequences of a finding of guilty except for insanity." *Id.* at 658 (emphasis in original). On appeal, the Oregon Supreme Court emphasized that the defendant was challenging the trial court's failure to give "**some** instruction that comported with" the statutory requirement; not just challenging the refusal of his proposed instruction. *Id.* at 660 (emphasis in original). *George* gives two reasons for excusing the defendant from the requirement of a completely correct instruction that the court said it "ordinarily" imposes on parties complaining about instructional error. The court's primary reason was the fact that the statute "unequivocally places the responsibility for giving the required instruction on the trial court, without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." *Id.* at 661.

Petitioner focuses exclusively on the secondary distinction offered by the court – the "futility" of proposing a correctly worded instruction when the trial court had refused to give even the uniform instruction on the point of law. But this comment has meaning only in the context of the unique error at issue in *George*. The decision of the trial court in *George* was reversed because the court erred in failing to give **any** instruction on a mandated topic of instruction. *Id.* at 662. That is not Petitioner's argument, here. Petitioner has raised only the more

narrow challenge on which the *George* defendant was **not** successful, *i.e.*, whether the trial court erred in refusing a specific proposed instruction. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1061 (2007) (describing argument of Petitioner, when this case was before the Oregon Supreme Court the first time, as whether "the trial court should have accepted" Petitioner's proposed instruction); *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1260 (2008) ("Under the Supreme Court's remand, then, it is our task to apply the constitutional standard set by the Supreme Court in our consideration of the sole issue raised by Philip Morris, *viz.*, whether the trial court erred in refusing to give proposed jury instruction No. 34.") Given the nature of Petitioner's claim of instructional error, the Oregon Supreme Court predictably applied its long-standing rule that error cannot be based upon the refusal of a specific instruction unless the requested instruction was correct in all respects.

III. Oregon Attorney Practice Aids Carefully Warn of this Procedural Requirement.

Not surprisingly, the practice aids available to Oregon lawyers consistently admonish trial attorneys to draft jury instructions that are correct in all respects. The Oregon State Bar Association publishes a variety of practice aids for Oregon attorneys that fully advise of the risk inherent in adding incorrect or misleading statements to a desired instruction. For example, the Oregon State Bar manual on Civil Pleading and Practice cautions:

> Nonuniform instructions that contain both proper and improper statements of the law are properly denied. The court is not required to give an incorrect instruction or to correct or edit the portions of an instruction that are in error or inapplicable. *Beglau v. Albertus*, 272 Or 170, 179, 536 P2d 1251 (1975); *Owings v. Rose*, 262 Or 247, 258, 497 P2d 1183 (1972); *Bremner v. Charles*, 123 Or App 95, 108, 859 P2d 1148 (1993); *Winnett v. City of Portland*, 118 Or App 437, 447, 847 P2d 902 (1993). A requested instruction is properly refused 'unless it ought to have been given in the very terms in which it was proposed.' *State v. Francis*, 284 Or 621, 626, 588 P2d 611 (1978); *Propp v. Long*, 129 Or App 273, 278, 879 P2d 187 (1994). In other words, if a trial court refuses to give a requested instruction, 'there is no error if the requested instruction is not correct in all respects.' *Hernandez v. Barbo Machinery Co.*, 327 Or 99, 106, 957 P2d 147 (1998). *See Hall v. The May Dept. Stores Co.*, 292 Or 131, 143, 637 P2d 126 (1981).

2 Oregon Civil Pleading and Practice (Oregon CLE 2006), § 39.7, p. 39-9.

Of particular relevance is a Practice Tip included among the advice to practitioners in the publication quoted above:

> PRACTICE TIP: The lawyer should separate complex instructions into several consecutive instructions with just one main point of law contained in each instruction.

> This practice will reduce the likelihood that the trial court will reject an entire multifaceted special instruction.

Id.

The same advice is given to Oregon criminal practitioners in the *Criminal Law* manual:

> A lawyer should keep in mind that the refusal to give a requested instruction is not error unless the instruction is correct in all respects. *State v. Montez,* 309 Or 564, 600, 612-13, 789 P2d 1352 (1990). If a proposed instruction is flawed, the trial court does not err in refusing to give it. *State v. Francis,* 284 Or 621, 626, 588 P2d 611 (1978).
>
> PRACTICE TIP: To avoid the rule of *Francis, supra,* it may be best to offer multiple alternative short requested instructions that deal with a single point and that are not argumentative or biased.

2 Criminal Law (Oregon CLE 2005), § 20.77, p. 20-53.

Another practice aid, the *Oregon Civil Litigation Manual* warns:

> Error [for a requested instruction refused] is preserved, however only if the requested instruction was correct in all respects. *Bennett v. Farmers Ins. Co.*, 332 Or 138, 153, 26 P3d 785 (2001). When a party's proposed instructions state the law inaccurately, the court has no duty to correct or edit the instruction, and it does not commit an error by refusing

> to give the jury the entire instruction. *Winnett v. City of Portland*, 118 Or App 437, 447, 847 P2d 902 (1993).

2 Oregon Civil Litigation Manual (Oregon CLE 2004), Appendix 32C, p. 32-114.

And the manual with which virtually every trial lawyer starts when creating a list of proposed jury instructions, *Oregon Uniform Civil Jury Instructions*, reminds practitioners in its Introduction:

> The general law governing jury instructions was set forth in *Williams v. Portland Gen. Elec.*, 195 Or 597, 610, 247 P2d 494 (1952):
>
> > "The parties to any jury case are entitled to have the jury instructed in the law which governs the case in plain, clear, simple language. The objective of the mold, framework and language of the instructions should be to enlighten and acquaint the jury with the applicable law. Everything which is reasonably capable of confusing or misleading the jury should be avoided. Instructions which mislead or confuse are grounds for a reversal or a new trial."

Uniform Civil Jury Instructions (Oregon CLE 2007), p. xi.

The rule is one with which appellate lawyers are, necessarily, well versed as well. The compendium of

case law in Oregon's *Appeal and Review* manual cites only one case to describe the standard the appellate courts apply in reviewing a claim of error based on the failure to give a requested instruction:

> *See Hernandez v. Barbo Machinery Co.* 327 Or 99, 106, 957 P2d 147 (1998) (court evaluates propriety of proposed jury instruction as a whole; if it would be error to give any part of proposed instruction, court does not err in refusing to give instruction).

Appeal and Review (Oregon CLE 1993 & Supp. 2002), §14.74, p. 14-36.

Once the Oregon Supreme Court determined that Petitioner had included in its Proposed Jury Instruction Number 34 statements that were legally incorrect and would have been misleading to the jury, it predictably applied the well established procedural rule adopted in *Sorenson,* and held that there was no error in the refusal of that requested instruction. Given the absence of any *George*-type argument by Petitioner about a spontaneous trial court duty to give some instruction on the harm-to-others concept, the only outcome on remand that would have been surprising or unprecedented would have been a decision by the Oregon Supreme Court that ignored Petitioner's failure to craft an instruction that was correct in all respects.

CONCLUSION

For the foregoing reasons, and for the reasons presented by the Respondent, the judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

MEAGAN A. FLYNN
PRESTON BUNNELL & FLYNN, LLP
Attorney for Amicus,
Oregon Trial Lawyers Association

AMICUS CURIAE BRIEF

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(14)

No. 07-1216

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In the

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PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,
Personal Representative of the
Estate of Jesse D. Williams, Deceased,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

TIMOTHY SANDEFUR
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

08507

A 30

QUESTION PRESENTED

Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. In furtherance of PLF's continuing mission to defend economic liberty, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation and a civil justice system that grants excessive liability awards. PLF has participated before this Court and the Supreme Courts of California, Illinois, New Jersey, and other states in cases involving the reach and scope of civil liability and the abuse of punitive damages. *See, e.g., Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655 (2008); *Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005); *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007); *State v. Lead Industries Ass'n, Inc.*, Nos. 2004-63-M.P., 2006-158-Appeal, 2007-

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

121-Appeal, 2008 WL 2605396 (R.I. July 1, 2008). PLF attorneys have also published articles on the dangers that a runaway civil justice system poses to American consumers and entrepreneurs. *See, e.g.*, Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006).

SUMMARY OF ARGUMENT

While the federalist system affords states broad discretion to act within the boundaries of the Constitution, they should not be free to manipulate state law in ways that subvert federally protected individual rights. This principle applies no less to state judiciaries than to state legislatures. The requirements of due process and equal protection, among others, bar state courts from interpreting state laws in ways that evade those limits. In short, state autonomy in the federalist system is limited by individual rights, and these limits are as essential when the state acts through the judicial process as when it acts through the legislative process.

In evaluating whether a state court has exceeded the boundaries of its legitimate constitutional discretion, this Court needs a baseline from which to judge state action. When a state judiciary deviates in sudden, unforseen, or arbitrary ways from traditional legal standards, it can violate the Fourteenth Amendment. *See, e.g., Bouie v. City of Columbia*, 378 U.S. 347 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Without a baseline it would be a simple matter for courts to evade

constitutional restrictions by simply redefining or retroactively altering the content of those rights that are defined by state law, and thereby defining whatever acts a state chooses to perform as "due process of law."

One area of the law in which such legerdemain has been frequent is in the realm of property rights. State courts frequently reinterpret state common law principles regarding property rights in ways that transfer these rights to the state without just compensation. This Court has occasionally observed that states may not "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Yet state courts continue to do just that. This Court should make clear that the baseline from which to evaluate the constitutionality of deviations by state courts should be those traditional common law understandings which historically inform the content and boundaries of individual rights, and not simply whatever legal order a state may choose to erect through judicial or legislative pronouncement.

ARGUMENT

I

THE AUTONOMY OF STATES IN THE FEDERAL SYSTEM IS LIMITED BY FEDERAL CONSTITUTIONAL STANDARDS AND INDIVIDUAL RIGHTS

A. States Do Not Have Discretion to Act Arbitrarily or Otherwise Violate Individual Rights

State autonomy in the federalist system "is not just an end in itself," but exists to better secure the rights of individuals. *New York v. United States*, 505 U.S. 144, 181 (1992). Thus while state judiciaries enjoy supreme authority to interpret state laws, they may not use that authority to violate federally protected individual rights, and they may not appeal to federalism to justify their doing so.

While these points may seem basic, it is worth emphasizing that states enjoy autonomy under the federal system ss a means to the attainment of certain substantive constitutional ends: specifically, the ends of securing such rights as life, liberty, and the pursuit of happiness. Declaration of Independence, 1 Stat. 1 (1776). Unfortunately, many judges and contemporary legal commentators tend to treat state power as an end in itself, or as an institution designed to allow states to "experiment" with legislation that violates individual rights. *See, e.g.*, Raoul Berger, *Federalism: The Founders' Design* 53 (1987) (portraying the Founders "solicit[ous] for preservation of the States" as an end in itself), Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*,

42 Hous. L. Rev. 637, 640 (2005) ("The Constitution does not assign to the national government the responsibility for pursuing any substantive conception of the good."), *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003) (citation omitted) (Thomas, J., dissenting) (finding that states may violate individual liberty for "uncommonly silly" reasons). But it is not logically possible to understand something by reference only to its means without also understanding its end. *See* Aristotle, *Physics* 194b, *reprinted in* Aristotle, *The Basic Works of Aristotle* 240 (Richard McKeon ed., 1941) ("[M]en do not think they know a thing till they have grasped the 'why' of it (which is to grasp its primary cause)"). Federalism must be understood with reference to its end: States do not enjoy autonomy simply on the presumption that state autonomy is a good; they have that discretion because—and only to the extent that—such discretion serves the "substantive conception of the good" which the Constitution explicitly contemplates. That conception is clear from the very beginning, in the Constitution's reference to "preserv[ing] . . . Liberty," which it explicitly describes as a "Blessing[]."

James Madison made this fact clear in the ratification debates, when he remarked that it was "preposterous" to object to the Constitution on the grounds that it "may derogate from the importance of the governments of the individual States[.]" *The Federalist* No. 45, at 288-89 (James Madison) (Clinton Rossiter ed., 1961). The Revolutionary War had not been fought, and "the precious blood of thousands spilt" just so that "individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty[.]" *Id.* at 289. On the contrary, the Revolution had been fought so that "the

people of America should enjoy peace, liberty, and safety." *Id.* Recognizing that "the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object," also meant recognizing that state autonomy was limited by individual rights. *Id.* Thus, "as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." *Id.* State autonomy in the federal system is thus an *instrumental* good, and not a good in itself which the Constitution incorporates for the sake of protecting states. Simply put, there is no legitimate state interest in violating individual rights.

The Constitution is not a treaty among sovereigns who are free to act in violation of the rights of citizens, but a sovereign authority which restricts state autonomy by both explicit and implicit limitations. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-25 (1816). The explicit restrictions are set forth in Article I, section 10, and elsewhere, while the implicit restrictions are established by the traditionally recognized individual rights lying at the center of American constitutional jurisprudence. *See, e.g., Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (protecting rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (protecting rights "implicit in the concept of ordered liberty"). States may not violate either the enumerated or unenumerated rights of individuals, regardless of the broad autonomy they enjoy under federalism.

This point was made clear in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). There, dissenting Justice Brandeis famously observed that "one of the happy incidents of the federal system" was that a state could "serve as a laboratory; and try novel social and economic experiments." *Id.* at 311. But the majority in *Liebmann* responded that "unreasonable or arbit[r]ary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental." *Id.* at 279. Although it is true that states may "indulge in experimental legislation," they may not do so "by enactments which transcend the limitations imposed upon them by the Federal Constitution," because "there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments." *Id.* at 279-80.[2] Again, in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942), Justice Jackson reiterated this point: "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority."

While the government of Oregon is therefore supreme in regulating its internal affairs, and its judiciary is the supreme interpreter of state law, this Court rightly retains power to intercede on behalf of citizens whose federal constitutional rights are violated under the color of state law. The state may not appeal

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[2] As Professor Jack Balkin observes, the New Deal jurisprudential revolution has meant that few people today remember the majority opinion's response to Justice Brandeis' "laboratory" argument. J.M. Balkin, *Federalism and the Conservative Ideology*, 19 Urb. Law. 459, 465 (1987).

to the values of federalism to defend actions which deprive citizens of the rights to due process of law, equal protection of the laws, and other federally recognized constitutional rights.

B. Federal Constitutional Limits on State Autonomy Apply to State Judiciaries No Less Than to State Legislatures

While the protections accorded by the Fourteenth Amendment have usually been applied in cases involving state *legislative* action, they also apply to the actions of state judiciaries. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). State courts are not free to act arbitrarily in the interpretation of state law, since lawfulness itself requires at a minimum that a state must treat individuals in a fundamentally fair, or nonarbitrary, way. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.27 (2008) ("'[R]ational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee."). This Court has repeatedly held that state courts cannot use their exclusive authority to interpret state law as an opportunity to violate individual rights or to subvert constitutional guarantees under the guise of interpretation.

In *Bouie*, 378 U.S. 347, several civil rights protestors engaged in a sit-in remained at a lunch counter after being ordered to leave. The state's law against trespassing only barred entry onto property after being warned not to enter; it did not prohibit a person who lawfully entered from remaining in a place after being told to leave. Nevertheless, the South Carolina Supreme Court interpreted the law to

prohibit staying on land after being ordered off, and it upheld the criminal convictions of the demonstrators. This Court reversed, because "by applying such a construction of the statute . . . the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350. The Court took pains to note that *Bouie* was not a "void for vagueness" case. *Id.* at 351. On the contrary, "the language of [the trespass law] was admirably narrow and precise; the statute applied only to 'entry upon the lands of another . . . after notice . . . prohibiting such entry.'" *Id.* at 351-52. But the state court's decision "unforeseeably and retroactively expanded [the statute] by judicial construction." *Id.* at 352. This arbitrary inconsistency with prior law was so radical as to violate the basic principles of fairness in the Due Process Clause.

Slightly more complicated was *Alabama ex rel. Patterson*, 357 U.S. 449, in which the state demanded that the NAACP hand over a list of members. The Association refused, and was held in contempt. *Id.* at 451. This Court granted certiorari, but the state argued that it lacked jurisdiction, because the NAACP had not adequately sought review by the appropriate writ to the state supreme court. *Id.* at 454-55. This error, the state continued, justified the Alabama Supreme Court in denying review, and because that denial was a state law procedural matter, this Court was barred from examining the underlying merits. *Id.* at 455. But this Court rejected this argument as a matter of *state* law:

> We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with *its past unambiguous holdings* as to the scope of review available upon a writ of certiorari addressed to a contempt judgment . . . . [Citing several Alabama state decisions.] . . . [W]e can discover nothing in *the prior state cases* which suggests that mandamus is the exclusive remedy . . . . Nor, so far as we can find, do any of these prior decisions indicate that the validity of [contempt] orders can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus.

Id. at 456-57 (emphasis added). The Court went on to hold that states may not abuse their judicial autonomy to evade review by the United States Supreme Court: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457-58. *Patterson* makes clear that this Court retains power to inquire into state law to ensure that the judiciaries of the states are not abusing their authority to avoid enforcement of federal constitutional guarantees. This Court has followed that rule in many other cases. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Douglas v. Alabama*, 380 U.S. 415, 421-22 (1965); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923).

In *Ward v. Bd. of County Comm'rs of Love County, Okla.*, 253 U.S. 17 (1920), the Court observed that it

has power to inquire not only into whether a litigant properly alleged federal rights, "but also whether [those rights were] denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support." *Id.* at 22 (citing cases). The Court has this power because "if nonfederal grounds, plainly untenable, may be . . . put forward successfully, our power to review easily may be avoided." *Id.*

The Due Process Clause, among other constitutional provisions, places a significant limit on the power of a state judiciary to rest its decisions on independent nonfederal grounds; this limit "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Id.* at 23. Indeed, *even where the nonfederal grounds might otherwise suffice*, this Court has power to examine those grounds where it is clear from the context of a case that they are being arbitrarily or unequally used by a judiciary determined to avoid this Court's judgment: "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim. There are, however, exceptional cases in which exorbitant application of *a generally sound rule* renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted; emphasis added). *See also Simpson v. Matesanz*, 175 F.3d 200, 207-08 (1st Cir. 1999) ("When the state ground rests on a state finding of procedural waiver, federal courts will consider whether the state had consistently applied the state rule to determine whether the state ground is adequate.").

This Court's power to inquire into the "adequacy" of the supposedly independent state grounds for a state judicial determination is essential to maintaining its authority to render judgments on federal constitutional matters and to enforce federal constitutional rights. Procedural fairness requires states to abide by predictable and stable rules which give defendants a fair opportunity to vindicate their federal rights. When a state court's decisions change rapidly, unpredictably, or without sufficient guiding principle, they may be "changing the rules in the middle of the game," in violation of due process. *See further* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1919 (2003) ("The Constitution or federal law imposes a duty of fidelity to prior state law . . . and the claim is that the state court materially and impermissibly departed from that law at a later point in time.").

C. State Courts Have Abused Their State-Law Supremacy to Deprive Citizens of Federal Constitutional Rights

The fact that state judicial decisions are immune from federal review when they are based on an adequate, independent state ground creates an incentive for state courts to manipulate their determinations to avoid this Court's oversight.

The classic example of this occurred at the height of the Civil Rights era, when southern state courts sought sometimes desperately for grounds to avoid this Court's mandates regarding desegregation. *Bouie* and *Patterson* are examples of this, but there are many others. *See Barr v. City of Columbia*, 378 U.S. 146, 149

(1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 301-02 (1964); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (*per curiam*) (summary disposition); *Wright v. Georgia*, 373 U.S. 284, 289 (1963). *See also* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 Mich. L. Rev. 80, 176 (2002); Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 Tenn. L. Rev. 869, 887-900 (1994).

State courts continue to employ this device today in other areas where enforcing constitutionally protected rights might be politically unpopular. Particularly common are cases involving the violation of private property rights. According to this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Fifth Amendment requires compensation for state action that restricts such rights, but not for restrictions that "inhere" in the "background principles of the State's law of property and nuisance." *Id.* at 1029. Thus by using their common law powers to retroactively alter the "background principles" of ownership, state courts can transfer property rights to the state, while avoiding both the just compensation requirement and federal court review. This abuse continues despite Justice Stewart's observation that states should not be free to "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes*, 389 U.S. at 296-97 (Stewart, J., concurring). *See also* David L. Callies & J. David Breemer, *Selected Legal & Policy Trends in Takings Law: Background Principles,*

Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations, 36 Val. U. L. Rev. 339, 379 (2002) ("newly discovering or expanding [background] principles in order to protect resources now deemed valuable . . . is inconsistent and irreconcilable with the protection of private rights in land").

The Oregon Supreme Court successfully used this tactic in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994), when owners of beach property sought a permit to build a seawall. The permit was denied, and the owners sued for just compensation, alleging that the denial amounted to a taking of their property for public use. *Id.* at 450-51. The court denied compensation on the grounds that "the common law doctrine of custom" barred landowners from excluding the public from the dry sand areas. *Id.* at 454. Yet this application of the doctrine of custom had been eliminated as a matter of law four years earlier in a case called *McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989), a case which the *Stevens* court completely ignored. Instead, although the *McDonald* decision declared that "[t]he public has no right to recreational use of the [dry-sand area] because there is no factual predicate for application of the doctrine [of custom]," *id.* at 724, the *Stevens* court did not mention this case, and declared that because the doctrine of custom set a background principle barring property owners from excluding the general public, the owners could not claim that the denial of their permits had deprived them of any right to exclude. *Stevens*, 854 P.2d at 456. Thus the court held that the owners had not actually suffered a taking and were not due compensation.

Although this Court denied *certiorari*, Justices Scalia and O'Connor observed that the *Stevens* decision was an (ultimately successful) attempt to manipulate state law to avoid the federal Constitution's requirements as well as this Court's review: "As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, . . . neither may it do so by invoking nonexistent rules of state substantive law." 510 U.S. at 1211 (Scalia, O'Connor, JJ., dissenting from denial of cert.).

Likewise, in *McBryde Sugar Co., Ltd. v. Robinson*, 504 P.2d 1330 (Haw. 1973), *cert. denied*, 417 U.S. 962 (1974), property owners sought declaratory relief regarding their rights to export water located on their land. The state supreme court, however, decided "[t]o the surprise of all concerned," that the waters belonged to the state and could not be sold. John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from "Startling" State Court Overrulings*, 11 Harv. J. L. & Pub. Pol'y 297, 342 (1988). By retroactively redefining the property rights in ways that eliminated the right at stake in the case, the state supreme court effected a taking of property in a manner that avoided the just compensation requirement. The federal district court later concluded that "[t]his retroactive taking of private property for and by the State, without payment therefor, was clearly the result of 'perverse reading of prior law.'" *Robinson v. Ariyoshi*, 441 F. Supp. 559, 585 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *rev'd*, 477 U.S. 902 (1986) (summary disposition). The state court's extreme alteration of background principles of state law was an attempt to "take away the private

property of the plaintiffs without paying them for it." 441 F. Supp. at 586.[3]

These cases indicate the need for constitutional baselines from which to measure legislative deviations. Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339, 352 (2006) (Classical conceptions of property rights "set[] a baseline determining whether an owner is suffering a 'burden' to her property rights or merely being limited to her equal rights."). As Justices Scalia and O'Connor observed in *Stevens*, "[o]ur opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights." 510 U.S. at 1211. This problem—the power of state courts to redefine the

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[3] This Court ultimately reversed *Robinson* summarily, 477 U.S. 902 (1986), citing the then-new decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). On remand, the Ninth Circuit concluded that the property owners had failed to exhaust their state remedies and therefore ordered the case dismissed. *Robinson v. Ariyoshi*, 887 F.2d 215, 216 (9th Cir. 1989). This outcome indicates the disproportionate impact of state court autonomy in just compensation cases. As the late Chief Justice Rehnquist recognized, victims of property takings—unlike the victims of any other kind of civil rights violation—are forced to litigate their cases in hostile state courts before seeking federal redress, and federal courts will routinely give preclusive effect to state court decisions. *San Remo Hotel, L.P. v. City & County of San Francisco, Cal.*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring). As a result, state courts have even greater power to manipulate state law doctrines in ways that take property without compensation and avoid federal court review. *See id.* ("*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee.").

state law background of a case in ways that eliminate individual rights and evade federal court review—has been a source of controversy in this Court for generations. *See Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570 (1905); *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 565-66 (1898); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 339 (1827) (Marshall, C.J., dissenting). But it has been exacerbated in recent years by the relaxed degree of scrutiny that federal courts apply to property and contract rights. Thanks to the extreme deference states are given in "rational basis" cases involving property rights—a degree of deference one federal judge characterized as "invit[ing judges] to cup our hands over our eyes and then imagine if there could be anything right with the statute," *Arceneaux v. Treen*, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., concurring)—states now have extremely broad power to violate private property rights under the guise of interpretation, simultaneously evading federal constitutional protections.

Here, the Oregon Supreme Court set a similar trap for Philip Morris. After being repeatedly instructed to reconsider its punitive damages decision in light of federal constitutional guarantees, the court interposed a procedural rule for the first time, one which had not been addressed at earlier stages of the litigation, and in such a way as to block the application of federal due process rules. By manipulating state procedural devices, the Oregon Supreme Court deprived Philip Morris of its properly litigated constitutional objections by claiming that they were not properly raised. Long-established and generally understood procedural rules, however, establish legitimate expectations for litigants, and thereby set

up a baseline from which deviations can be judged in terms of due process. Just as the trespassers in *Bouie* had formed certain expectations on the basis of long-established legal principles which the state could not evade consistently with due process, so here the state may not interpose a procedural device and thus deprive Philip Morris of procedural fairness by the simple expedient of claiming that the procedure sets the content of Philip Morris' due process rights. Such a brazen political device should not be allowed to flout this Court's authority as a defender of the Constitution.

In *Backus*, 169 U.S. 557, this Court described its power to inquire into the regularity of state judicial proceedings with regard to property rights, in words that apply to this case as well. "[T]he settled rule of this court in cases of this kind is to accept the construction placed by the supreme court of the state upon its own constitution and statutes as correct," wrote Justice Brewer for the majority, *id.* at 566, yet this Court "may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation." *Id.* at 565. This Court must retain power to ensure that the state has not manipulated or altered its state law in ways that violate individual rights.

This case is one of the most stark instances of the abuse of judicial authority to change rules in the middle of the game in order to punish an unpopular defendant. At a previous stage of this litigation, for example, the Oregon Supreme Court even retroactively reinterpreted its criminal statute regarding

manslaughter in order to characterize Philip Morris' lawful sales of cigarettes as "manslaughter," thereby altering the "reprehensibility" element in the calculation of punitive damages. *See Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1179-80 (Or. 2006). This despite the fact that for at least 45 years before that decision, Oregon law held unequivocally that corporations cannot commit manslaughter, *State v. Pacific Powder Co.*, 360 P.2d 530, 532 (Or. 1961), and that "[n]o criminal prosecution for corporate manslaughter has been successful in any United States mass products liability action." Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 Widener L.J. 733, 771 (2008). This far-fetched interpretation of state law indicates the court's willingness to indulge even extreme applications of state law in its crusade to impose crushing punitive damages on Philip Morris for selling cigarettes—and to evade this Court's strictures on the limits of punitive damages. Yet even after this Court reversed the punitive damages award based on this outlandish reinterpretation of its laws, the Oregon Supreme Court nevertheless reaffirmed its earlier decision through a formalistic application of a procedural rule which had never until then been a focus of the litigation. It is difficult to explain such conduct except by reference to the fact that faithfully applying this Court's mandate "would have meant giving a victory to a hated tobacco-company defendant." Anthony J. Sebok, *The Oregon Supreme Court Once Again Affirms a Blockbuster Punitive Damages Award Against Philip Morris—Even in the Face of a U.S. Supreme Court Decision Seemingly to the Contrary*, FindLaw.com,

Feb. 12, 2008.[4] Such behavior is not excused by the principles of federalism and may not be permitted in the face of this Court's authority to protect federal constitutional rights. As the Rhode Island Supreme Court recently observed, courts

> can provide justice only to the extent that the law allows. Law consists for the most part of enactments that the General Assembly provides to us, whereas justice extends farther. Justice is based on the relationship among people, but it must be based upon the rule of law . . . . "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'"

Lead Industries Ass'n, Inc., 2008 WL 2605396, at **2-**3 (footnote omitted) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921)). The decision below is marked by repeated instances of biased, outcome-determinative decisions, the product of a desire to accomplish a just outcome whatever the cost. But whatever opprobrium might attach to the defendant in this case, it is entitled to a

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[4] *Available at* http://writ.news.findlaw.com/sebok/20080212.html (last visited July 21, 2008).

consistent, orderly disposition of this case in a manner that respects its rights and obeys the mandates of this Court.

CONCLUSION

Philip Morris, like any other defendant, is entitled to a fair judicial proceeding by the settled rules of Anglo-American law. *Gore*, 517 U.S. at 585 ("The fact that [defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair [proceedings].").

The decision below should be *reversed*, and the Oregon Supreme Court instructed to comply with this Court's prior mandate.

DATED: August, 2008.

Respectfully submitted,

TIMOTHY SANDEFUR
Counsel of Record
DEBORAH J. LA FETRA
Pacific Legal Foundation
3900 Lennane Drive,
Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF PUBLIC JUSTICE, P.C.; THE TOBACCO LEGAL CONTROL CONSORTIUM; THE TOBACCO PRODUCTS LIABILITY PROJECT; THE TOBACCO CONTROL RESOURCE CENTER; PUBLIC HEALTH ADVOCACY INSTITUTE; THE TOBACCO TRIAL LAWYERS ASSOCIATION; AND THE AMERICAN ASSOCIATION FOR JUSTICE, AS *AMICI CURIAE* SUPPORTING RESPONDENT

ELIZABETH J. CABRASER
(*Counsel of Record*)
STEVEN E. FINEMAN
NIMISH R. DESAI
LIEFF, CABRASER, HEIMANN & BERNSTEIN, LLP
275 Battery Street, 30th floor
San Francisco, CA 94111-3339
(415) 956-1000

Counsel for Amici Curiae

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INTEREST OF AMICI CURIAE[1]

Public Justice, P.C., is a national public interest law firm that marshals the skills and resources of attorneys to create a more just society. Public Justice has pioneered cases advancing consumers' rights, preserving the environment, upholding civil rights and liberties, and safeguarding the civil justice system. Public Justice seeks to vindicate individual rights by holding wrongdoers accountable for their misconduct. Punitive damages are a vital weapon in this effort. If punitive damages awards are arbitrarily restricted, without allowing for flexibility as warranted by the facts of each case, the purposes these damages are meant to serve—to punish unlawful conduct and deter its repetition—will be thwarted. That is particularly true in an exceptional case such as the present, where the Petitioner and other tobacco companies, working together, have carried out an extended campaign of fraud and deceit, with disastrous consequences for the public health.

The Tobacco Control Legal Consortium ("TCLC") is a national network of legal centers providing technical assistance to public officials, health professionals, and advocates in addressing

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[1] In accordance with Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a contribution to its preparation or submission. The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. TCLC's coordinating office is located at the Tobacco Law Center of the William Mitchell College of Law in St. Paul, Minnesota. TCLC grew out of collaboration among specialized legal resource centers serving six states and is supported by national advocacy organizations, voluntary health organizations, and others. TCLC also prepares legal briefs as amicus curiae in cases in which its experience and expertise may assist courts in resolving tobacco-related legal issues of national significance. It has submitted amicus briefs in recent cases before this Court; and, *inter alia*, the Supreme Courts of California, Delaware, Florida, Kentucky, Montana, South Carolina, and Washington.

The Tobacco Products Liability Project ("TPLP") of the Public Health Advocacy Institute, Inc. ("PHAI") is a non-profit, public interest organization dedicated to protecting the health of the public. The goal of PHAI is to support and enhance a commitment to public health in individuals and institutions that shape public policy through law. PHAI is committed to research in public health law, public health policy development, providing legal technical assistance and collaborative work at the intersection of law and public health. PHAI has unusual depth and breadth of experience in tobacco control issues generally, as well as longstanding and specific expertise in the legal and policy issues relating to tobacco control. Since 1979, PHAI has provided legal information in support of tobacco control through the publication of research scholarship and direct legal and policy assistance to

public health organizations, governmental agencies and individuals. TPLP and PHAI are based at Northeastern University School of Law in Boston, Massachusetts.

The Tobacco Control Resource Center ("TCRC"), founded in 1979 at the Northeastern University School of Law, is a division of the PHAI devoted to supporting and enhancing public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

The Tobacco Trial Lawyers Association ("TTLA") is a national organization of approximately 80 lawyers, law firms and non-profit organizations who specialize in tobacco litigation; more specifically, handling personal injury, death and consumer claims against the manufacturers and sellers of tobacco products. Injury, death and economic loss from tobacco products represent the greatest public health challenge in history and the number of victims increases each year. Public health estimates implicate tobacco in over 500,000 deaths annually in the United States and many times that worldwide. TTLA's mission is to provide collaborative resources to help its attorney members and others hold the tobacco industry fully accountable for this public health disaster. TTLA members have special expertise and experience in the litigation strategy employed by Philip Morris and the tobacco industry in general and special interest in educating the courts and the public in this area.

The American Association for Justice ("AAJ") is a voluntary national bar association whose approximately 50,000 members primarily represent

plaintiffs in personal injury actions and other civil litigation. AAJ believes that punitive damages serve as a vital tool both in deterring wrongful conduct and in promoting public safety. In addition, it is AAJ's belief that state supreme courts properly exercise broad authority to administer state tort law and state procedural rules to serve the ends of justice.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Philip Morris contends that the Oregon Supreme Court's restoration of the jury's punitive damage verdict should be overturned by this Court because Philip Morris had no notice that its proposed jury instruction had to be "correct in all respects" in order to constitute a proper request under well-settled Oregon law.

In seeking to be excused from compliance with established Oregon jury instruction law, Philip Morris claims to be as victimized and disadvantaged as a *pro se* litigant defending itself blindly in a system with which it has no experience, and for which it lacks adequate resources to compete with a sophisticated adversary. But Philip Morris is a seasoned and sophisticated litigant. After years of skilled litigation in both the Oregon system and this Court, Philip Morris invokes ignorance of the law as an excuse for a completely new trial. This amicus brief is respectfully submitted to defuse any residual impression that Philip Morris may or should, consistent with fundamental due process principles, be excused from its responsibilities under Oregon law and treated as an outgunned litigant who needs or deserves special help from this Court.

Delay denies justice, and our system struggles to minimize the delay that occurs as a side effect of due process. Delay is a necessary evil, not a positive virtue, and no party has a legitimate interest in creating or increasing it as a litigation tactic. Jesse Williams died in 1997. In 2008, Petitioner wants a new trial. Yet Petitioner is no litigation novice, humbly begging a second chance after its first brush with an unfamiliar system has gone awry. Petitioner has an active legal history of exploiting litigation cost and delay as a bludgeon to punish and deter plaintiffs in smokers' actions like this one.

The history of tobacco litigation demonstrates the aggressive use of every available delaying tactic, and the investment of vast resources, by Philip Morris and its fellow cigarette manufacturers in a relentless and devastating strategy of attrition. Philip Morris has become accustomed, by virtue of its repeated success, to the presumption that this is a legitimate strategy, entitled to enforcement by this Court "on request," regardless of its own undeniable failure to follow longstanding Oregon rules. Petitioner ignores state rules with impunity when it suits Petitioner's strategy of attrition, only to invoke them when it loses. The principle of due process, which accords to both sides, in every tribunal, the "just, speedy, and inexpensive determination of every action and proceeding[2] should prohibit, not reward, such tactics.

The implications of Petitioner's strategy are especially ominous for those, like the Williams, who

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[2] *See, e.g.* Fed. R. Civ. P. 1. Oregon, like many other states, has adapted and enforced the identical rule.

suffer significant harm that generates low compensatory damages: retirees, homemakers, and those who are aged or impecunious when they suffer injury or death from a defendant's purposeful and profitable wrongful conduct. The States have an abiding interest in applying their procedural rules to protect such victims from litigation abuse that should be honored and enforced by this Court. This Court's entry into the traditional States' province of punitive damages was not intended to serve as yet another instrument of attrition. It should not be stretched beyond due process bounds, by honoring untimely requests for exemption from long-established State rules, simply to accord well-heeled litigants as many appellate and trial opportunities as they can afford, to the ultimate prejudice of their adversaries.

ARGUMENT

I. PHILIP MORRIS IS A SOPHISTICATED LITIGANT WHO NEITHER NEEDS NOR IS ENTITLED TO THE EXTRAORDINARY INTERVENTION OF THIS COURT

As Petitioner's website homepage, "Philip Morris USA," states: "We are the largest tobacco company in the U.S. . . .Philip Morris USA is the nation's leading cigarette manufacturer and for more than 20 consecutive years has had the highest revenues, income, volume and market share in the U.S. cigarette business."[3]

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[3] http://www.philipmorrisusa.com/en/cms/Company/Corporate_Structure/default.aspx (last visited October 18, 2008)

At the trial of this matter, Petitioner Philip Morris gambled – and lost – on a proffered jury instruction that materially misstated Oregon law. When its requested jury instruction No. 34 was rejected, it failed to submit a correct one. Philip Morris, an experienced and well-funded litigant, was represented by experienced Oregon trial counsel, who made a tactical decision whose consequences were clear to them under Oregon law.[4] Philip Morris now asks this Court, years after the trial, to intervene on its behalf, and order the State of Oregon to expend its fiscal and judicial resources on a new trial. Such extraordinary "relief" not only rewards Petitioner, but punishes the plaintiff, an elderly widow who followed Oregon's trial rules and met her burden of proof, by requiring her to spend more money, and abide additional years, on a new trial (and to endure the cost or delay of Petitioners' own predictable additional appeals).

Sometimes, under rare circumstances, the enlightened application of due process bestows upon unsophisticated or impoverished litigants a fresh start, a second chance at recasting their defense

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[4] Oregon's courts have uniformly held that there is no error in refusing the requested instruction if it is not "clear and correct in all respects, both in form and in substance, and unless it is altogether free from error." *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975); *Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972) ("trial court is not obliged to give an incorrect instruction, or to give the correct portions of one which includes errors"). Oregon practice manuals advise trial counsel they should not intermix different legal propositions within a single requested jury instruction. Oregon State Bar, APPEAL AND REVIEW §§ 9.23; 14.74 (2002 Supplement) This authoritative treatise was co-authored by Jay Beatty, who argued the jury instruction issue for Petitioner at trial. J.A. 11a-29a.

strategy. But Philip Morris is no Gideon, and its trumpet blows off-key. Gideon had no counsel, and no defense strategy. Philip Morris had excellent trial counsel, well-versed in Oregon law.[5] Philip Morris has refined its defense strategy over decades, and seeks from this Court that which the Oregon Court correctly denied: a reward for being too clever by half.

Philip Morris is a seasoned litigant who has utilized every rule of procedure available in every jurisdiction – properly and improperly – to prevent any smoker's case from reaching final judgment. Few cases – only a handful – including the *Williams* case now (and again) before this Court, have survived the Petitioner's litigation gauntlet to reach – and win – a trial.

Litigation against the tobacco industry began in 1954. The industry faced a collective crisis – a great cancer scare – that threatened its existence. Together, the tobacco companies, including Petitioner Philip Morris USA ("Philip Morris"), fought back with a campaign of deceit and deception. Part of that campaign was the early decision – reaffirmed over the decades – to wage a war of attrition in courtrooms around the nation, abusing the legal process and concealing evidence.[6]

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[5] *See Estate of Schwartz v. Philip Morris, Inc.*, 135 P.3d 409 (Ore. Ct. App. 2006), in which Petitioner's counsel's correct presentation of single-sentence jury instructions under established Oregon procedure won it a reversal of a 2002 trial verdict.

[6] The cigarette industry's successful litigation history derives from an early decision to fight all lawsuits at any cost. The industry considered that if any case were settled, there would

For year after year, decade after decade, individual smokers sued tobacco companies, including Petitioner.[7] The industry beat them back with aggressive, no-money-spared litigation. This strategy was widely publicized in the media and entered the popular culture.[8] For decades, the

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be tens of thousands of potential claimants to whom payment – no matter how small – would be prohibitive. *See, e.g.*, E.J. Jacob & Jacob Medinger, *Report Prepared by RJR Outside Legal Counsel Transmitted to RJR Executives for the Purpose of Rendering Legal Advice Concerning Smoking and Health Issues and Litigation*, http://tobaccodocuments.org/bliley_rjr/504681987-2023.html, at 50468-1997 (June 27, 1980). The industry demanded "[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount." J.F. Hind, *Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee*, http://tobaccodocuments.org/bliley_rjr/505574976-4977.html, at 50557-4977 (June 29, 1977).

[7] The federal judge presiding over the Department of Justice ("DOJ") tobacco litigation recently found that Petitioner and the industry engaged in a 50-year scheme in violation of racketeering laws – "with little, if any, regard for individual illness and suffering . . . or the integrity of the legal system" – and further found that the racketeering continues to this day. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 852 (D.D.C. 2006) .

[8] Hill & Knowlton, Background Material on the Cigarette Industry Client (Dec. 15, 1953), http://legacy.library.ucsf.edu/tid/wvc34c00. A central strategy for the cigarette industry's approach to litigation "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial." Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, Wall St. J., Apr. 29, 1987, at 25. Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco

industry paid not one penny, by way of judgment or settlement.

Petitioner has had 54 years to hone its litigation strategy and refine its defense.

In the early 1950s, several scientific studies linking smoking and lung cancer were published. This caused a public sensation, termed "the Big Scare" by the tobacco companies.[9] In response, in December 1953, the leaders of the tobacco companies – including the president of Philip Morris – met in New York's Plaza Hotel to formulate a plan of action; the first meeting of the industry executives in years, as "criminal convictions" under antitrust laws had led them to keep their distance. But with the death toll from lung cancer at 25,000 a year and rising, the "very existence" of the tobacco industry was threatened, and the same corporations who battled each other for market share banded together to protect and promote the total market from their common product.[10]

As a result of the Plaza Hotel meeting, the industry – including Philip Morris – published a full-

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industry's "overwhelming strength and prowess at every turn." *Id.*

[9] *Tuosto v. Philip Morris USA Inc.*, 2007 U.S. Dist. LEXIS 61669, *4 (S.D.N.Y. 2007).

[10] This meeting, and the events, agreements, and conduct surrounding it, are detailed in Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 Stan. L. Rev. 853, 858 (1992); and in *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 36-39 (D.D.C. 2006), describing the creation of a conspiratorial RICO "enterprise" among Philip Morris and its competitors.

page advertisement in newspapers around the country on January 4, 1954, titled "A Frank Statement to Cigarette Smokers."[11]

The "Frank Statement" raised doubts about the causal link between smoking and disease: "For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence."[12]

The "Frank Statement" announced the creation of the Tobacco Industry Research Committee, later re-named the Council for Tobacco Research, which the industry proclaimed would conduct research under the direction of "a scientist of unimpeachable integrity," but which in fact served as a foundation of the industry's conspiracy. [13]

The "Frank Statement" propounded misrepresentations and false promises: "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health." [14]

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[11] The Frank Statement reset out in its entirety in *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 at 39-40.

[12] *Id.* at 40.

[13] *Id.*

[14] *Id.*

That same year, 1954, saw the filing of the first personal injury cancer case against the tobacco industry. Rabin, *supra*, at 857. For decades, Philip Morris and the other companies worked together to rebuff claims against cigarettes and preserve their market.[15] The industry's self-proclaimed litigants' strategy was unleashed: aggressive, scorched-earth tactics, no offer of settlement (not "a penny," in the words of Philip Morris's general counsel),[16] and concealment of internal documents evidencing the industry's admissions that its product caused death and disease. This strategy was "unique in the annals of tort litigation." Rabin, *supra*, at 857. "From the beginning, the cigarette companies decided that they would defend every claim, no matter what the cost, through trial and any possible appeals." *Id.*

This "endless appeal" strategy has characterized tobacco litigation in every decade. For example, *Green v. American Tobacco* wound through 12 years of litigation, two trials, five appeals, and two unsuccessful petitions for certiorari to this Court. Rabin, *supra*, at 861.[17] *Ross v. Philip Morris* lasted 10 years, from 1954 through 1964. At trial, six physicians testified for Philip Morris that cigarettes did not cause the plaintiff's throat cancer,

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[15] The Oregon Supreme Court's 2006 decision in this case includes references to industry-wide cooperation. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-70 (Or. 2006)).

[16] *See Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 n.13 (D.N.J. 1993).

[17] *Green v. American Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962); *Green v. American Tobacco Co.*, 391 F.2d 97, 101-02 (5th Cir. 1968); *Green v. American Tobacco Co.*, 409 F.2d 1166, 1167 (5th Cir. 1969), *cert. denied*, 397 U.S. 911 (1970).

with some also testifying that alcohol was a suspected cause. *Ross v. Philip Morris & Co. Ltd.*, 328 F.2d 3, 4-5 (8th Cir. 1964).

Thayer v. Liggett & Myers Tobacco Co., 1970 U.S. Dist. LEXIS 12796 (D. Mich. 1970), ended in a jury verdict for defendant. Afterwards, the trial court – disturbed by the defendant's "overwhelming superiority in resources" and "insatiable appetite for procedural advantage" – detailed the abuses. *Id.* at 18, 19. Among other things, the court noted that the defendant was evasive in discovery, *id.* at 5-6, 9-10; "confidently risk[ed] tactics" knowing that the plaintiff "could not afford the luxury of a mistrial," *id.* at 18, and obtained a sweeping protective order, "on grounds which later proved largely illusory," to isolate plaintiff's counsel. *Id.* at 16; *see also id.* at 10-14. Meanwhile, defense counsel freely engaged in extensive cooperation with other industry attorneys. *Id.* at 15 & n.8, 16, 17 n.10, 101-02.

As the *Thayer* court concluded:

> The court is convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial.
>
> This question, unfortunately, is now moot because plaintiff cannot afford further proceedings.

Id. at 59.

II. PHILIP MORRIS HAS DEPLOYED A LITIGATION STRATEGY OF ATTRITION FOR 50 YEARS THAT HAS DENIED DUE PROCESS TO PLAINTIFFS IN TOBACCO LITIGATION

The *Green*, *Ross*, and *Thayer* cases described in Section I above, and many others, enabled Petitioner to hone its defensive craft. As Petitioner became a successful veteran of trials in both federal and state courts, these remained unsuccessful for plaintiffs, regardless of their merit. As a result of the tobacco companies' concerted deployment of an unwavering strategy of attrition, the suits were, as predicted, simply too expensive to win this. This striking success at eroding judicial constraints on litigation abuse gave Petitioner's industry bragging rights. As R.J. Reynolds' general counsel put it:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his. [18]

Ironically, *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, (D.N.J. 1993), a notorious example of due process defeated by attrition, also stands as a

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[18] *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (citing April 29, 1988 memo from J. Michael Jordan, counsel for RJ Reynolds Tobacco Co.).

rare instance in which a trial court, alarmed by the threat of this unchecked litigation-as-war strategy to due process, finally called the tobacco defendants (including Petitioner) out. The *Haines* case was filed in 1984. By 1992, plaintiffs' counsel (a well-respected and experienced firm) was forced to file a motion to withdraw, exhausted by interminable delays and mounting expenses, including $500,000 in deposition transcript costs alone. Judge Lechner, reluctantly permitting the withdrawal, wrote:

> *Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of the weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants . . . Litigation costs have become intolerable, and they cast a threatening shadow over the basic fairness of our legal system.*

814 Supp. at 424.

Plaintiffs did not *always* lose. The *Cipollone* case itself survived the pretrial costs and delays, and reached trial. The result was the first verdict for a plaintiff in a smoker's case. The judgment survived, in part, on review by this Court, and was remanded for further proceedings. [19]

Yet, following this Court's decision, which vindicated their claims, the *Cipollone* plaintiffs, after a decade of litigation, consented to a dismissal with prejudice. *See Haines*, 814 F. Supp. at 417 n.4.

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[19] *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

Their attorneys – recognized at the time as "the leading law firm" in tobacco litigation – also moved to withdraw from related tobacco cases, citing the "unreasonable financial burden." *Id.* at 418, 425. In 10 years, not a single of the firm's tobacco cases had been resolved on the merits. *Id.* at 421 n.14. Given this record, no lawyer was willing to take over these cases. *Id.* at 425. This was a familiar theme. As two other attorneys from the era wrote:

> The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their case, no matter how hard they look. . . . [B]y making the cost of litigation so high, the cigarette manufacturers have closed the courthouse doors to most people who have gotten sick or died from using their products.
>
> They have done this by resisting all discovery aimed at them. . . . They have done it by getting confidentiality orders attached to the discovery materials they finally produce, . . . forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering . . . every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting

> plaintiffs' counsel in the position of taking numerous expensive depositions or else not knowing what the witness intends to testify at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.[20]

Other plaintiffs' lawyers described similar tactics: "[T]he Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived," "[T]he cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial," "Elementary school records from the 1930s from a small town in Kentucky were obtained. When an objection was made, the explanation was that he might have had a health course in the elementary grades."[21]

In the end, this era of individual smokers' litigation concluded with the tobacco industry's undefeated record intact. After almost 40 years of litigation, and 300 cases filed since the 1950s, there

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[20] William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 276-77 (1989).

[21] *Id* at 297-299.

still had not been a single judgment – or penny paid – to plaintiffs. *Haines,* 814 F. Supp. at 428 n.31.

The tobacco industry's record of attrition is not merely a matter of historical interest. Petitioner's product continues to kill thousands of smokers (such as Jesse Williams himself, who began smoking in the early 1950s as the industry conspiracy took hold.[22] This Court has remarked upon the uniquely tragic public health crisis caused by smoking, and the tobacco industry's successful resistance to regulations.[23] Citing FDA documentation, this Court recited the tragic litany of smoking statistics. One in three regular smokers dies from cigarette-caused disease.[24] That amounts to more than 400,000 deaths each year in the United States from tobacco-related illnesses, including cancer, respiratory illnesses, and heart disease.[25] With approximately half of the domestic market

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[22] *See Williams*, 127 P.3d at 1168.

[23] As this Court wrote in 2000, cigarette smoking is "one of the most troubling public health problems facing our Nation today. . . ." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (Petitioner, a party to the *FDA* case, was one of those seeking exemption from FDA regulations for its product). "A striking irony emerges when one considers that the industry that markets the most dangerous product sold in America is the only industry that has been completely sheltered from the storm of twentieth-century product liability." Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. Cal. L. Rev. 1423, 1424 (1980).

[24] 539 U.S. at 135.

[25] *Id.* at 127-28.

share, Philip Morris products cause 200,000 of those deaths.

In August 2006, the district court in the DOJ tobacco litigation[26] found that the companies – including Petitioner – "violated and continue to violate" the Racketeer Influenced and Corrupt Organizations Act ("RICO") and that "[t]here is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past."[27]

The *Philip Morris* RICO order was entered after seven years of litigation, the production of millions more pages of documents, and a bench trial of nine months. *Id.* at 28. The district court found "overwhelming evidence," *id.*, at 27, and summarized the industry's scheme as follows:

> [O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction . . . and they abused the legal system in order to achieve their goal –

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[26] *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006).

[27] 449 F. Supp. 2d at 911.

> to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.[28]

Repeatedly, the *Philip Morris* court cited the industry's abuse of the legal system, stating that, "At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes."[29] The court found that these actions furthered the RICO enterprise's goals, which included "avoiding or, at a minimum, limiting liability for smoking and health related claims in litigation." [30]

The industry documents that were concealed from the public for 40 years, and withheld from the plaintiffs in *Haines*, *Cipollone*, and many other cases, were ultimately produced by Liggett, which broke ranks with Petitioner to precipitate the Attorneys General settlement in the 1990s. They are now available to potential plaintiffs, but many thousands of smokers are long dead and have lost the opportunity, contrary to Petitioner's recommended jury instruction in this case, to "bring lawsuits of their own." When plaintiffs do attempt such suits, they meet the identical strategy that still confronts Respondent in this case: appeal after appeal, and multiple petitions to this Court. Petitioner has sought to exploit and distract this Court's legitimate concern with punitive damages,

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[28] 449 F. Supp. 2d at 852.

[29] *Id.* at 28.

[30] *Id.* at 866.

and has turned due process on its head. This Court should not allow its due-process-derived punitive damages jurisprudence to be exploited and distorted into a further deterrent and punishment against plaintiffs who seek to vindicate their states' interests in the public health and safety.[31]

III. THE EVEN-HANDED APPLICATION OF DUE PROCESS IS NECESSARY TO UPHOLD STATE INTERESTS IN PUNISHMENT AND DETERRENCE AGAINST A CONCERTED STRATEGY OF LITIGATION ABUSE

Philip Morris' conduct caused Jesse Williams' death. Jesse Williams was a human being who died in 1997; Philip Morris is a limited liability corporation with the potential for immortality. The law of Oregon, as elsewhere, treats both as legal persons, and does not discriminate[32], despite the many "peculiar characteristics of corporations as distinguished from natural persons."[33]

The reality that, apart from legal fiction human and corporate persons are different creates a profound challenge in applying punitive damages to fulfill the express and legitimate deterrent and retributive functions this Court has repeatedly

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[31] *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); *BMW of N. Am., Inc. v. Gore*, 517 US. 559, 576-77 (1996).

[32] *Behnke-Walker Business College v. Multnomah County*, 146 P.2d 614, 617-18 (Or. 1944).

[33] *Nelsen v. Davidson Industries, Inc.*, 360 P.2d 307, 310 (Or. 1961).

acknowledged.[34] Human beings feel shame, fear, and pain. Sanctions involving death, imprisonment, or dishonor thus serve as powerful deterrents. Corporations may not be killed and themselves feel no inhibitory emotions. Human beings are held personally accountable for their crimes and torts. In contrast, corporate responsibility is merely economic, and is dispersed among thousands or millions of shareholders, none of whom is at risk in excess of her investment.[35] If punitive damages are to effectively punish and deter corporate misconduct, they must be imposed at a level sufficient to modify the behavior of the corporation's officers, directors and shareholders.

Optimal deterrence is achieved by confronting defendants with damages equal to the aggregate tortious loss, or by requiring disgorgement of all profits from reprehensible conduct. The *Williams* award itself, either alone or in combination with those handful of other smokers have obtained, does not present such a confrontation; the *Williams* award itself reflects only a week or two of Petitioner's yearly profits. Petitioner's reprehensible conduct, in Oregon and elsewhere, remains economically profitable. No unconstitutional level of punitive damages has been reached with *Williams*. Such awards are necessary to overcome the strategy of attrition that, while now exposed, is still at work

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[34] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *State Farm*, 538 U.S. at 416.

[35] *See U.S. v. Philip Morris*, 449 F. Supp. 2d at 28 (finding, *inter alia*, that Petitioner deceptively marketed "lethal" products with "single-minded focus on financial success" "without regard for the human tragedy or social costs that success exacted.")

in tobacco litigation and is evident in the instant case.

In its *Cipollone* decision, this Court rejected the tobacco industry's plea for preemption, and enabled smokers' tort claims to continue against tobacco companies, recognizing that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."[36] But not potent enough. The *Cipollone* litigation itself was protracted, both before and after its trip, at Petitioner's behest, to this Court.[37]

While the verdict in *Cipollone* was $400,000, plaintiffs incurred over $500,000 in out-of-pocket costs and over $2 million in lawyer and paralegal time to accomplish this result, while an astounding $50 million was spent by Petitioner and its fellow defendants on the case.[38] Tobacco company attorneys were quoted in the press as stating, "This verdict sends a message to all plaintiffs' attorneys that these cases are not worth pursuing."[39]

Until 2001, despite over 40 years of litigation, no tobacco company had paid a nickel to settle a

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[36] *Cipollone*, 505 U.S. at 521.

[37] The verdict was followed by more appeals to the Court of Appeals, and to this Court, which affirmed and reversed in part. *See Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), and *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

[38] *See* Andrew Blume, "*Will Next Round of Smoking Challenges be Worth Pursuing?*," The National Law Journal, June 21, 1988.

[39] *Id.*

smokers' case, or satisfy a smokers' judgment.[40] The strategy of attrition was absolute. The lesson has been well learned by would-be plaintiffs, and their lawyers. While the tobacco tragedy is certainly, in the words of a California Court of Appeal, "the quintessential mass tort,"[41] there is no quintessential mass tort tobacco litigation. The 1999 *Williams* verdict did not precipitate a wave of smokers' suits in Oregon. Past and pending tobacco suits number in the high hundreds or low thousands, not the hundreds of thousands or millions that public health statistics would predict. The tobacco companies' misconduct is open, obvious, and notorious – scarcely hidden at this point – but nonetheless undetected, unpunished, and undeterred.

Petitioner and its *amici* have expressed concern that the *Williams* award will be replicated in future Oregon suits, inflicting multiple punishment for the same harm. The Oregon statute protects against this outcome.[42] Moreover, Petitioner has

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[40] The first payment, $1 million, came in March 2001, to 70 year old Grady Carter. His years-long battle is described in *Carter v. Brown & Williamson Tobacco Corp.*, 778 So.2d 932 (Fla. 2000) and was concluded by this Court's denial of certiorari to defendants. *Brown & Williamson Tobacco Corp. v. Carter*, 533 U.S. 950 (2001).

[41] *Henley v. Philip Morris, Inc.*, 114 Cal. App. 4th 1429, 1478 (Cal. App. 2004), *cert. denied*, 544 U.S. 920 (2005) ("Plaintiff's claims ...rest on a quintessential 'mass tort,' i.e., a course of more-or-less uniform conduct *directed at the entire public* and maliciously injuring ...an entire category of persons to which plaintiff squarely belongs.").

[42] Oregon law prevents replication of the *Williams* verdict. Philip Morris will not be punished again for its conduct toward Jesse Williams, and will be punished less, next time, for its

repeatedly resisted the legitimate procedural solution (suggested by this Court in *State Farm)* of "inclusion" of all similarly injured persons before one court for binding determination of all punitive damages toward the group.[43]

Rule 1 of the Federal Rules of Civil Procedure embodies due process, announcing the overarching mandate of the federal courts themselves, and the lawyers who practice in them: "to secure the just, speedy, and inexpensive determination of every

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conduct toward another Oregon smoker. Oregon law provides for consideration of past punitive damage awards. Or. Rev. Stat. § 30.925(2)(g).

[43] 538 U.S. at 421-22. Petitioner has persistently opposed every effort to bring any class or group action against any aspect of tobacco industry conduct. *See, e.g., Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006); *cert. denied sub nom R.J. Reynolds v. Engle*, 128 S.Ct. 96. *reh'g denied*, 128 S.Ct. 694 (2007) (describing Florida smokers' protracted class action efforts). Classwide punitive damage calculations could nonetheless provide conformity and predictability within each similarly-situated group, while ensuring against overdeterrence and preventing multiple punishment. *State Farm* allows "inclusion" of all who claim compensatory and punitive damages from the same defendant for the same conduct, and other courts have noted "the safeguards against duplicative punishment that inhere in the class action procedure" as "mechanisms . . . for punishing defendants" where "there has been a pattern of illegal conduct resulting in harm to a large group of people." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 797 (8th Cir. 2004) (citing *State Farm*). Yet Petitioner does not request that the entirely new trial it seeks here include all Oregon smokers, a procedure arguably "superior to other available methods" to secure the "fair and efficient adjudication" of Philip Morris' punitive damages liability to Oregon smokers under established Oregon law. ORCP 32D; ORCP 1.

action and proceeding."[44] This Court has dubbed these goals "the touchstones of federal procedure."[45] Oregon Courts follow the identical rule, and pursue the identical policies.[46]

Petitioner, true to its history as a scorched earth litigant, advocates further cost and delay by seeking this Court's indulgence to start over, in a proceeding that, with two trips each to this Court and the Oregon Supreme Court, is already the antithesis of speedy and inexpensive, and, given Petitioner's superior resources and corporate longevity, is palpably unfair to Respondent.

Litigation tactics or motions that are technically correct, or arguably appropriate in some circumstances, may be unfair ·· and sanctionable · in others. Under the Federal Rules, and Oregon's

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[44] Fed.R.Civ.P. 1. Rule 1 has the force of law and implements Article 3, Section 2 of the Constitution. The policies that underlie the Federal Rules, quintessentially those articulated in Rule 1, apply expressly to the Courts of Appeals. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989).

[45] *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). "The lawyer's role extends beyond filing motions and being an unquestioning mouthpiece for his client: His role is to engage in the adversarial process in good faith and in accordance with" the precepts of Rule 1. *Reebok Int'l v. Sebelen*, 959 F.Supp. 553, 558 n. 1 (D.P.R. 1997). Litigants have an obligation to refrain from conduct that frustrates Rule 1. *Hill v. McMillan McGraw-Hill Sch. Publ'g Co.*, 1995 WL 317054 (N.D. Cal. 1996), *appeal dismissed*, 102 F.3d 422 (9th Cir. 1996).

[46] "ORCP 1B states that the Oregon Rules of Civil Procedure 'shall be construed to secure the just, speedy, and inexpensive determination of every action.'" *Dotson v. Smith*, 307 Ore. 132, 137, 764 P.2d 540, 543 (Ore. 1988).

identical Rule, motivation matters. Fed.R.Civ.P. 11 and ORCP 17(c) prohibit filing motions for "any improper purposes, such as to harass or cause unnecessary delay or needless increase in the cost of litigation," and empower the courts to punish such transgressions. It is little exaggeration to characterize Petitioner's chosen litigation strategy as a pattern and practice of ongoing Fed.R.Civ.P. 11/ORCP 17 violations.[47]

Petitioner seeks not due process, but its polar opposite: undue and undeserved exemption from the procedural rules that govern every other litigant, every day, in all Oregon civil trials.

As observed in *In re Tobacco Litigation*,[48] every litigant is entitled to due process, consistent

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[47] Tobacco defendants are infamous in the tobacco litigation bar for filing a bewildering array of motions. This is no coincidence. One internal industry document instructs that "it is critical to file a series of motions *in limine* before each trial," to gain the "slight tactical advantage found in forcing plaintiff's counsel, on the eve of trial to respond to such motions and to formulate alternative trial strategies in the event that any of defendants' motions are granted." Jones Day, *Smoking and Health Litigation Tactical Proposals*, http://tobaccodocuments.org/ness/38741.html, (Aug. 10, 1985).

[48] *In re Tobacco Litig.*, 624 S.E.2d 738, 744 (W. Va. 2005) (Starcher, J., concurring). The *In re Tobacco Litigation* court was asked to determine whether the Due Process Clause, as interpreted by this Court in *State Farm v. Campbell*, precluded a bifurcated trial procedure for the personal injury and punitive damages claims of 1,000 individual smokers. The West Virginia high court analyzed the due process implications, and determined that a Phase I/Phase II proceeding that subjected every plaintiff's punitive damages claim to an individual calculation, based on the compensatory damages awarded to each, comported with due process and *State Farm*. 624 S.E.2d at 739, 740-43.

with the court's "duty to afford *all* parties due process." In other words, due process is not the monopoly of one side or the other, the consideration of "what process is due" depends upon the facts and procedural posture of each case, and a grant of "due process" to one party that unduly frustrates its opponent's Rule 1 entitlements is not due process, but injustice. Due process is shared between contending litigants, and is calibrated on a "sliding scale" that balances the circumstances of each.[49]

Petitioner has dishonored due process by treating every procedural opportunity as a weapon of attrition, and procedure as its private property, for five decades. Now it wants a break - a dispensation from the evenhanded application, by the Oregon courts, of jury instruction rules it established nearly a century ago.[50]. This brief does not suggest this Court apply the Golden Rule with a vengeance, and let be done unto Petitioner what it has done unto its adversaries for 50 years. The Oregon Supreme Court's ruling is far fairer than that. It simply

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[49] 624 S.E.2d 744, 748 (Starcher, J., concurring).

[50] It has long been "fundamental that a request for an instruction may properly be denied, without error, unless the requested instruction is clear and correct in all respects, both in form and substance, and unless it is altogether clear from error." *Beglau*, 536 P.2d at 1256 (collecting cases). There is not a quirk of Oregon procedure that could have caught Petitioner off guard. It is consistent with our adversary system's principle of party presentation, as recognized by this Court. *See Greenlaw v. United States*, 128 S.Ct. 2559, 2564 (2008). This Court's history of denying relief to those who disregard their responsibility to prepare clear and correct instructions extends nearly 150 years. *See Beaver v. Taylor*, 93 U.S. 46 (1876); *Harvey v. Tyler*, 69 U.S. 328 (1864).

enables the Williams' legal journey to be done, while Mrs. Williams, at least, still lives.

CONCLUSION

The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

ELIZABETH J. CABRASER
(*Counsel of Record*)
STEVEN E. FINEMAN
NIMISH R. DESAI
LIEFF, CABRASER, HEIMANN
& BERNSTEIN, LLP
275 Battery Street, 30th Floor
San Francisco, CA 94111
(415) 956-1000

Counsel for Amici Curiae

AMICUS CURIAE BRIEF

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PHILIP MORRIS USA, INC.,

Petitioner,

v.

MAYOLA WILLIAMS, Personal Representative of the Estate of Jesse D. Williams, Deceased,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE RETIRED OREGON SUPREME COURT JUSTICES SUSAN M. LEESON, HANS A. LINDE, BETTY ROBERTS, AND RICHARD L. UNIS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DAVID F. SUGERMAN
PAUL & SUGERMAN PC
520 SW 6th Avenue
Suite 920
Portland, OR 97204
(503) 224-6602

ROBERT K. UDZIELA
1515 SW 5th Avenue
Suite 808
Portland, OR 97201
(503) 972-7604

SCOTT A. SHORR
(Counsel of Record)
STOLL STOLL BERNE LOKTING & SHLACHTER PC
209 SW Oak Street,
5th Floor
Portland, OR 97204
(503) 227-1600

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This brief addresses whether:

1. Oregon's procedural rule that proffered jury instructions must be "correct in all respects" is long-standing and consistently applied; and,

2. the consistent application of that neutral procedural rule in this case provided Philip Morris with due process of law.

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INTEREST OF *AMICI CURIAE*[1]

Petitioner and allied *amici* specifically assert that the Oregon Supreme Court erred in applying state law procedural rules following this Court's remand.

Amici curiae Susan M. Leeson, Hans A. Linde, Betty Roberts and Richard L. Unis ("Oregon Retired Justices") are retired justices who served on the Oregon Supreme Court. Justices Leeson and Roberts also served as judges on the Oregon Court of Appeals, the intermediary appellate court that handles the bulk of Oregon's civil appeals. Justice Unis also served as a trial judge in Multnomah County Circuit Court.

Justices Leeson, Linde and Unis brought academic experience to the Oregon Supreme Court, as well. Justice Leeson served as a professor of political science at Willamette University, and Justice Linde served as a professor of law at the University of Oregon School of Law. Justice Unis taught for decades at

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[1] All parties previously filed written consents with the clerk consenting to the filing of all amicus briefs. Pursuant to United States Supreme Court Rule 37, the parties were given ten days advance notice of this filing. This brief was authored in whole by counsel for the *amici curiae*. No party or its counsel authored the brief in whole or in part. Counsel for *amici* were not paid for their work on this brief. Counsel advanced costs for printing and filing, but will be reimbursed only for their costs by the Oregon Trial Lawyers Association.

Northwestern School of Law at Lewis & Clark College and the Judicial College.

The Oregon Retired Justices have no financial interest in the outcome of this case. However, as judges who have served on the Oregon Supreme Court, as judges who served in Oregon's lower courts, and as academics who have studied and taught about Oregon and federal jurisprudence and procedure, each of the Oregon Retired Justices has extensive experience with state procedural rules.

The Oregon Retired Justices write to explain the Oregon rule regarding jury instructions and to comment on the role of state courts in applying newly-emerging due process requirements. The state law rule is basic and has been applied consistently by all courts in Oregon: a party's proffered jury instruction must be correct in all respects. If it is not, then a trial court does not err when it refuses to give the instruction.

SUMMARY OF ARGUMENT

In remanding this matter to the Oregon Supreme Court, the Supreme Court directed it to provide due process consistent with the new standards announced in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (2007). On remand, the Oregon court gave Philip Morris the process that was due by applying state law rules that became pertinent on remand. *Williams v. Philip Morris Inc.*, 176 P.3d 1255 (2008) ("*Williams II*"), *cert. granted*, 128 S. Ct. 2094 (2008).

Oregon courts adhere to a "first things first" approach, taking on state law issues before considering questions of federal constitutional law. The Oregon Supreme Court followed that method in both of its decisions in this case. In its 2006 decision, the Oregon Supreme Court held that Philip Morris's proffered Instruction No. 34 incorrectly summarized state law, as it related to harm to others. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1176 (2006) ("*Williams I*"), *cert. granted*, 547 U.S. 1162 (2006), *judgment vacated*, 549 U.S. 346 (2007). The Oregon Supreme Court had no need to reach the additional state law defects in Instruction No. 34 until this Court remanded the case for a second review. In 2008, the Oregon Supreme Court again applied the correct-in-all-respects standard on remand, focusing on the additional state substantive law defects in the instruction. *Williams II*, 176 P.3d at 1263.

In its second remand to the Oregon Supreme Court, this Court announced a new feature of due process, holding that punitive damages may not be based on harm to anyone except the plaintiff in the case. *Philip Morris USA*, 127 S. Ct. at 1065. This Court did not construe the Fourteenth Amendment to require trial judges to draft instructions independent of those submitted by the litigants. Nor did this Court otherwise override the familiar state law requirement that a jury instruction must state the law correctly. Oregon courts follow longstanding rules regarding jury instructions. First, parties are responsible for drafting and submitting jury instructions. Second, a

proffered instruction will not be given unless it is correct in all respects. Oregon courts consistently apply these rules in all jury trials.

ARGUMENT

I. The Posture of This Case Determines Its Proper Disposition.

This Court remanded the case to the Oregon Supreme Court to apply a new due process rule for punitive damage cases. As this Court acknowledged, it had not specifically articulated the due process requirement prohibiting punishment for harm to others in punitive damage cases until this case. *Philip Morris USA*, 127 S. Ct. at 1065.

The Oregon Supreme Court initially held that defendant's proposed Instruction No. 34 was "not correct as an independent matter of Oregon Law respecting the conduct of jury trials and instructions that are given to juries." *Williams I*, 127 P.3d at 1176. This was so because Oregon law of punitive damages allowed the jury to consider whether defendants' misconduct harmed others. *Id.* at 1175. The Oregon Supreme Court determined as a matter of federal law that due process did not prohibit this consideration, so long as the conduct causing others' harms was similar to the conduct that harmed the plaintiff. *Id.* at 1176.

The Oregon Supreme Court then applied Oregon's longstanding rule requiring that a proposed jury

instruction must correctly state the law. *Williams I*, 127 P.3d at 1176 ("Because the proposed jury instruction did not accurately reflect the law, the trial court did not commit reversible error when it refused to give it. *See Hernandez v. Barbo Machinery Co.*, 957 P.2d 147, 152 (Or. 1998) (trial court's refusal to give requested jury instruction 'is not error if the requested instruction is not correct in all respects.')"). Having disposed of the primary issue, the Court had no occasion at that time to address other errors of state substantive law contained in defendant's Instruction No. 34.

As the Oregon Supreme Court explained after this Court's second remand, proffered Instruction No. 34 incorrectly summarized state substantive law in various ways. These errors in state substantive law were based on a state statute that operated independently of the due process standard announced by this Court in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). *Williams II*, 176 P.3d at 1263 ("even assuming that proposed jury instruction No. 34 clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly."). The Oregon Supreme Court measured the remainder of Instruction No. 34 for correctness with Oregon law, found it flawed, and held that the trial court did not err in refusing it. *Id.*

To be sure, the Oregon Supreme Court did not articulate all of the state law flaws with Instruction No. 34 in *Williams I*. When it dealt with only those

state law flaws necessary to dispose of *Williams I*, the Oregon Supreme Court proceeded in its normal fashion. Like many courts, the Oregon Supreme Court prefers to render decisions on narrow grounds, so as to avoid adjudicating issues unnecessarily or prematurely. *See, e.g., Oregon v. Dameron*, 853 P.2d 1285, 1293 (Or. 1993).

Oregon appellate courts adhere to a first-things-first approach, with a strong preference for addressing state law questions before reaching federal questions. *See, e.g., Oregon v. Campbell*, 705 P.2d 694, 703 (Or. 1985) (*citing*, Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. Balt. L. Rev. 379 (1980) and Carson, *Last Things Last: A Methodological Approach to Legal Argument in State Courts*, 19 Willamette L. Rev. 641 (1983)).

The Oregon Supreme Court consistently followed that practice here. In its first decision, it rejected defendant's Instruction No. 34 because the instruction incorrectly summarized then-existing state law. *Williams I*, 127 P.3d at 1175, *citing Parrott v. Carr Chevrolet*, 17 P.3d 473, 489 (Or. 2001). The instruction – which combined many components into one lengthy instruction – had additional state-law flaws that ripened for consideration only upon remand.

This Court's subsequent announcement of a new due process element for punitive damages cases does not appear to require state courts to jettison state law procedures. A litigant is still not entitled to a jury charge that incorrectly instructs on state law. Due

process does not permit or require state appellate courts to reverse a trial court for failing to give an instruction that was erroneous on several points of state law.

To hold otherwise represents a marked departure from the established relationship between the state and federal courts. Such a decision – by implication – would mandate that state courts dispose of all possible state law issues in all cases with potential federal questions. That outcome would tell state courts that they may not decide disputes on the narrowest grounds presented, even if that is how the state court chooses to adjudicate cases.

II. The Oregon Rule Places the Onus on Parties to Craft Correct Jury Instructions.

Philip Morris argues that the rule requiring clear instructions creates a new and impermissible barrier to its assertion of federal due process rights. Philip Morris Brief on the Merits, pp. 23-24. To the contrary, the requirement is long-standing and consistently applied. Parties in civil cases are entitled to jury instructions on their respective theories of the case, so long as the instructions are supported by the evidence and correctly drawn. *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975).

The rule – which was the product of studied consideration by the Oregon Supreme Court – dates back almost a century. *Sorenson v. Kribs*, 161 P. 405, 410 (Or. 1916). It has been applied and restated

through the ensuing years. *Hotelling v. Walther*, 148 P.2d 933, 936 (Or. 1944) (onus of drafting clear and correct instructions falls on the parties; trial judges are not clairvoyants); *Wiebe v. Seely, Administrator*, 335 P.2d 379, 393 (Or. 1959) (trial courts properly refuse requested jury instructions if they are not correct in all aspects); *Stanich v. Buckley*, 368 P.2d 618, 622 (Or. 1962) (proper to refuse to give instruction that did not correctly state the law); *Owings v. Rose*, 497 P.2d 1183, 1188 (Or. 1972) (trial court is not obligated to pick out correct passages of proposed instructions, while deleting those passages that are incorrect). *Hernandez*, 957 P.2d at 151 (Or. 1998) (requested instructions given only if they accurately state the applicable legal standards).

The Oregon Supreme Court consistently applies the rule in civil litigation. The rule has worked against plaintiffs and against defendants in civil litigation. *Compare, e.g., Schultz v. Shirley*, 220 P.2d 86, 88 (Or. 1950) (affirming civil judgment in favor of defendant because part of plaintiff's proposed multipart instruction inaccurately summarized the law) *with, e.g., Hooning v. Henry*, 213 P. 139, 140 (Or. 1923) (affirming judgment in favor of plaintiff because defendant failed to submit a correct instruction).

The Oregon Supreme Court has applied the same rule in death penalty cases. *Oregon v. Reyes-Camarena*, 7 P.3d 522, 528 (Or. 2000) ("Because defendant's requested sympathy instruction, considered in its entirety, did not state the law correctly in

all respects, the trial court did not err in refusing to give that sympathy instruction regardless of whether the instruction was correct in part.") Even when the stakes are literally life and death, the court applies the same rule.

Against this standard, the errors in the proffered instruction determine the outcome. As the Oregon Supreme Court explained on the second remand, Philip Morris assigned error to the failure to give its proffered Instruction No. 34. *Williams II*, 176 P.3d at 1260. The proffered instruction erroneously summarized state substantive law in multiple respects. *Williams II*, 176 P.3d at 1261-63.

The errors in the instruction related to state substantive product liability standards set forth by the Legislative Assembly. Or. Rev. Stat. 30.925(2). These statutory standards on punitive damages control jury discretion in assessing punitive damages. The proposed instruction simply ignored or overwrote provisions of the statute.

For example, Philip Morris's Instruction No. 34 altered the statutory scheme by making permissive that which the Legislative Assembly concluded was mandatory. *Williams II*, 176 P.3d at 1262-63. As well, the proposed instruction misstated one of the operative considerations Oregon juries give to the assessment of punitive damage claims. *Williams II*, 176 P.3d at 1263.

The errors in the instruction had no connection with the due process issue of punishing for harm to

others. The Oregon Supreme Court did not demand prescience on the part of Philip Morris. That is to say, the Oregon Supreme Court did not fault the defendant because it failed to offer an instruction that correctly predicted the future course of this Court's due process jurisprudence. Rather, the Oregon Supreme Court reviewed defendant's demand for a new trial on an instruction that incorrectly summarized state statutory standards, and denied that relief. So long as defendant had the opportunity to make its arguments and present its best instruction, there was no due process flaw when the Oregon court asked whether the instruction correctly stated Oregon law in all respects. In the end, this Court decided a due process issue and remanded the matter to the Oregon Supreme Court. The Oregon Supreme Court reviewed this Court's disposition and then applied the same due process standards available to every litigant in the State. And using those same standards, the Oregon Supreme Court found that there was no error because Philip Morris's proffered jury instruction failed correctly to state the law. Unless this Court is now prepared to declare that due process requirements invalidate a neutral state law rule of trial procedure, the Oregon Supreme Court did not err.

CONCLUSION

The Oregon Retired Justices *amici* have no stake in the outcome, save for an institutional concern over unfounded criticism leveled at the Oregon Supreme

Court. In applying the well-established state law rule, the Oregon Supreme Court did not defy this Court. Neither did it engage in some trickery or sleight of hand. Instead, the Oregon Supreme Court provided to Philip Morris the full panoply of due process protections when it required Philip Morris to comply with the longstanding rule regarding jury instructions.

Respectfully submitted,

SCOTT A. SHORR
(Counsel of Record)
STOLL STOLL BERNE LOKTING & SHLACHTER PC
209 SW Oak Street, 5th Floor
Portland, OR 97204
(503) 227-1600

DAVID F. SUGERMAN
PAUL & SUGERMAN PC
520 SW 6th Avenue
Suite 920
Portland, OR 97204
(503) 224-6602

ROBERT K. UDZIELA
1515 SW 5th Avenue
Suite 808
Portland, OR 97201
(503) 972-7604

Counsel for Amici Curiae Retired Oregon Supreme Court Justices Susan M. Leeson, Hans A. Linde, Betty Roberts, and Richard L. Unis

AMICUS CURIAE BRIEF

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IN THE

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PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

ARVIN MASKIN
KONRAD CAILTEUX *
B. KEITH GIBSON
JED P. WINER
ISABELLA C. LACAYO
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Date: August 20, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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QUESTION PRESENTED

Whether, after this Court has adjudicated the merits of a party's federal constitutional claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may instead hold the federal claim forfeited by interposing a state-law procedural rule in a way that serves no legitimate state interest and is neither firmly established nor regularly followed.

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INTEREST OF *AMICI CURIAE*[1]

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys' fee awards. WLF appeared as *amicus curiae* in this case when it was before this Court previously, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), and again at the certiorari stage urging review. *Philip Morris USA v. Williams*, 128 S. Ct. 2904 (2008).

WLF's Legal Studies Division has also published on the topic of punitive damages. *See, e.g.*, Arvin Maskin & Peter A. Antonucci, *Punitive Damages Primer: Legal Principles And Constitutional Challenges* (WLF Monograph, 1994); Theodore B. Olson & Thomas H. Dupree, Jr.,

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[1] Pursuant to S. Ct. R. 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution to the preparation and submission of this brief.

Supreme Court Revisits Constitutional Limits On Punitive Damages (WLF Legal Opinion Letter, Oct. 20, 2006); Evan M. Tager, *Philip Morris USA v. Williams: Another Brick In The Punitive Damages Wall* (WLF Legal Backgrounder, March 9, 2007).

The Allied Educational Foundation ("AEF") is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy and has appeared as co-*amicus curiae* with WLF in this case and in other punitive damages cases in this Court. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996).

WLF and AEF believe that this Court must act in this case to ensure that lower courts are not allowed to pick and choose which of this Court's decisions they will follow. To allow lower courts to act in such a manner would risk undermining important constitutional protections this Court has afforded parties, especially where state courts argue that independent state law grounds prevent review of federal issues. This result would not serve the interests of justice and finality.

By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

In its prior decision in this case, this Court held that the Oregon Supreme Court had "applied the wrong constitutional standard" when it held that a jury could impose punitive damages on a defendant for potential injuries to non-parties. *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1065 (2007). The Court remanded the case to the Oregon Supreme Court, instructing it to reconsider Philip Morris's due process argument against the backdrop of the correct constitutional standard—that juries are *not allowed* to punish defendants for potential harm to non-parties arising out of the same conduct at issue in the case before them. *Id.* Rather than comply with this Court's instructions, however, the Oregon Supreme Court instead applied a novel state law procedural rule, and reaffirmed its prior opinion without addressing the due process violations found by this Court. *Williams v. Philip Morris USA*, 176 P.3d 1255, 1263-64 (Or. 2008) (*Williams III*).

This reaffirmance was based on the Oregon Supreme Court's belated finding that the jury instruction proposed by Philip Morris included errors of state law—errors that were wholly unrelated to the constitutional issue previously decided by this Court. *Id.* Because the Oregon Supreme Court's decision disregarded this Court's mandate, and, in the process, denied Philip Morris the due process rights that this Court held must be enforced on remand, this Court should reverse the punitive damages award against Philip Morris and

direct the Oregon Supreme Court to order a new trial. This action is necessary to make clear to lower courts that they cannot pick and choose when to follow a directive from this Court.

This case arises out of the death of Jesse Williams from lung cancer, which was attributed to smoking. Mr. Williams's widow sued Philip Morris for negligence and deceit related to its cigarette marketing practices. Following trial, the jury found Philip Morris liable and awarded $821,000 in compensatory damages—which the trial court reduced to $521,485 pursuant to Oregon's statutory cap—and $79.5 million in punitive damages. The trial court held that the punitive damages award was unconstitutionally "excessive" under this Court's holding in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and reduced the award to $32 million. Both sides appealed, and the Oregon Court of Appeals reinstated the $79.5 million punitive damages award. The Oregon Supreme Court denied review, but this Court granted *certiorari*, vacated the decision, and remanded the case to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA v. Williams*, 540 U.S. 801 (2003).

On remand, the Oregon Court of Appeals affirmed its prior opinion finding that the $79.5 million punitive damages award was not unconstitutionally excessive. *Williams v. Philip Morris USA*, 92 P.3d 126 (Or. Ct. App. 2004)

(*Williams I*). The Court of Appeals rejected Philip Morris's argument that the trial court erred in failing to instruct the jury that it could not award punitive damages in order to punish Philip Morris for harm to non-parties. *Id.* at 142 ("[W]e are not persuaded by defendant's argument that we erred in our previous decision when we rejected its argument that the trial court erred by failing to instruct the jury that it could not punish defendant for the impact of its misconduct on others."). The Oregon Court of Appeals never raised, or even hinted at, the possibility that Philip Morris had failed to preserve its right to continue to argue that the jury instructions given by the trial court violated its due process rights. Rather, the Oregon Court of Appeals reviewed, considered, and rejected this constitutional argument on the merits and held that the trial court did not err by refusing to instruct the jury that it could not punish Philip Morris for harm that its conduct may have caused to non-parties in awarding punitive damages.

Following this second decision by the Oregon Court of Appeals, the Oregon Supreme Court accepted the case for review. Its review was limited to two questions: (1) whether a defendant is entitled to have the jury instructed "that punitive damages cannot be imposed for alleged harm to non-parties;" and (2) whether the punitive damages award against Philip Morris was unconstitutionally excessive. *Williams v. Philip Morris USA*, 127 P.3d 1165, 1171

(Or. 2006) (*Williams II*).[2] The Oregon Supreme Court held that the instruction proposed by Philip Morris was incorrect to the extent it would have prohibited the jury from punishing Philip Morris for harm to third parties. *Id.* at 1176.[3] At no time did the Oregon Supreme Court—or any other Oregon court reviewing this case—indicate that there might be a state law procedural ground barring further review of whether the jury's consideration of harm to third parties violated Philip Morris's constitutional rights. Instead, each time the Oregon courts reviewed the case prior to this Court's 2006 decision, they reviewed the merits of—and rejected—Philip Morris's argument that it was improper for the trial court to refuse to instruct the jury that it could not punish Philip Morris for, among other things, harm it allegedly inflicted on non-parties.

Following the Oregon Supreme Court's initial decision, this Court granted *certiorari* to consider two questions: (1) whether Oregon had unconstitutionally permitted Philip Morris to be

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[2] The Oregon Supreme Court, in *Williams II*, declined to consider additional issues that it held had not been preserved by Philip Morris on appeal. 127 P.3d at 1171. It did not, however, indicate that Philip Morris had waived its right to challenge the constitutionality of the trial court's refusal to instruct the jury that it could not punish Philip Morris for harm to non-parties.

[3] The Oregon Supreme Court also evaluated the propriety of the punitive damages award itself and held that it was not excessive. *See id.* at 1176-82.

punished for harming nonparty victims; and (2) whether Oregon in effect had disregarded the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm. *Philip Morris*, 127 S. Ct. at 1062. The Court answered the first question in the affirmative, holding that the Due Process Clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." *Id.* at 1063. The Court explained that due process "requires States to provide assurances that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused to strangers." *Id.* at 1064. This Court clarified that juries cannot punish for harm caused to non-parties even if the alleged harm was produced by the same or similar conduct—thereby rejecting the distinction the Oregon Supreme Court had relied upon in finding that *State Farm* did not require reversal. *Id.* at 1065.[4] Further, this Court held that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk" that juries may be considering harm to others in seeking to punish a party—which is forbidden—rather than considering such harm "under the rubric of reprehensibility"—which is permissible. 127 S.Ct. at

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[4] The Oregon Supreme Court, in *Williams II*, stated that this Court's decision in *State Farm* did not require reversal of the punitive damages award because that case only prohibited juries from considering harm to third parties arising from *dissimilar* conduct. 127 P.3d at 1175-76.

1065. It remanded the case and directed the Oregon Supreme Court to "apply the standard set forth" in the Court's decision. *Id.*[5]

On remand, the Oregon Supreme Court framed its task as "apply[ing] the constitutional standard set by the Supreme Court in [its] consideration of the sole issue raised by Philip Morris, *viz.*, whether the trial court erred in refusing to give [Philip Morris's] proposed jury instruction []." *Williams III*, 176 P.3d at 1260. Because the Oregon Supreme Court found that Philip Morris's proposed jury instruction did not completely and correctly state Oregon law on issues wholly distinct from the due process issue before it, it reaffirmed its prior ruling without considering the due process issues as directed by this Court. *Id.* at 1263-64.

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[5] Because application of the constitutional standard the Court laid out had the potential to lead to a new trial or remittitur of the punitive damages award, the Court did not answer the second question—whether the punitive damages award was unconstitutionally excessive. *Philip Morris*, 127 S.Ct. at 1065.

SUMMARY OF THE ARGUMENT

The Court's prior decision in this case instructed the Oregon Supreme Court on remand to "apply the [constitutional] standard" announced in this Court's opinion. 127 S.Ct. at 1065. Rather than follow this Court's explicit directions, the Oregon Supreme Court instead applied a novel state law procedural rule—never before applied in the nine years of appellate litigation in this case—as a basis for reaffirming its prior decision. The Oregon Supreme Court's blatant refusal to consider this Court's mandate to review the violation of Philip Morris's constitutional rights should not be tolerated. This Court should reject the Oregon Supreme Court's attempt to use a state law procedural rule that is neither firmly established nor regularly followed to avoid applying the due process standard previously enunciated by this Court by reversing the punitive damages award against Philip Morris and ordering a new trial.

Allowing the Oregon Supreme Court's decision to stand would provide a road map to other lower courts—especially state courts applying state law—on how to avoid decisions from this Court with which they disagree. Moreover, the Oregon Supreme Court's decision to wait until this late stage of the litigation to invoke a state law procedural rule in order to avoid reviewing the federal constitutional issues in this case, as directed, wastes the limited resources of not only the parties and the Oregon courts, but of this Court as well. To prevent such an

unnecessary waste of those precious resources, this Court should act to make clear that once issues are certified for review and decided by this Court, lower courts must follow the mandate and directions of this Court. In this case, that requires reversing the punitive damages award against Philip Morris and ordering a new trial.

ARGUMENT

I. THIS COURT SHOULD NOT ALLOW THE OREGON SUPREME COURT TO IGNORE THIS COURT'S DIRECTIVE.

This Court's prior ruling could not have been clearer—the due process clause "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . who are, essentially, strangers to the litigation." *Philip Morris*, 127 S. Ct. at 1063. The Court also made clear that the Due Process Clause "requires *States* to provide assurances that juries are not asking the wrong question," and in the process punishing defendants for harm to those strangers. *Id.* at 1064 (emphasis added). The Oregon Supreme Court ignored these instructions and refused to address the constitutional deficiencies in the jury instructions given in this case. The Oregon Supreme Court tried to justify its actions through the application of a post-hoc procedural mechanism—not raised by the Oregon courts in the previous nine years of litigation. This Court should not tolerate such a blatant disregard for its mandate. Rather, given the

continued violation of the petitioner's due process rights throughout this litigation, including following the remand from this Court, the punitive damages award against Philip Morris should be reversed, and a new trial should be ordered.

A. The Oregon Supreme Court Should Be Required To Apply This Court's Previous Decision.

The last time this case was before this Court, the Court addressed the issue of whether or not the petitioner's due process rights were violated when the jury was instructed that it could consider potential harm to non-parties as part of its punitive damages calculus. The issue was certified to this Court following the Oregon Supreme Court's determination that such an instruction was proper and did not violate the petitioner's due process rights. *Williams II*, 127 P.3d at 1176.[6] Prior to certifying the issue to this Court, neither the Oregon Supreme Court, nor the Oregon Court of Appeals (which ruled on the merits of this issue twice),

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[6] The first time this case was before the Oregon Supreme Court, that court evaluated the merits of Philip Morris's due process claim without reference to whether state procedural issues barred consideration of the federal due process claim. *See Williams III*, 176 P.3d at 1259 (Oregon Supreme Court characterized its first holding as ruling on the merits of the "federal requirements of due process law"). It was only after this Court reversed the Oregon Supreme Court's erroneous holding on Philip Morris's constitutional claims that this new independent state law ground was raised as a bar to consideration of petitioner's claim of error.

indicated that there were any independent state law grounds for avoiding the due process issue presented to this Court. Rather, the Oregon Supreme Court considered and rejected Philip Morris's argument that federal due process law prohibits a jury from punishing a defendant for the impact of its alleged misconduct on non-parties. *Williams II*, 127 P.3d at 1176 (noting that Philip Morris's position did not "correctly state federal due process law"). The Oregon Supreme Court did not indicate that there was any independent state law procedural rule that prevented it from ruling on the federal due process issue.[7] Instead, the Oregon Supreme Court based its holding on the ground that due process law *does* allow juries to consider harm to non-parties resulting from alleged misconduct similar to that at issue in the case before it. *Id.* It was only after this Court rejected that holding—ruling that the failure to instruct the jury that it could not punish Philip

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[7] Indeed, under Oregon law, courts traditionally decide questions of state law in the first instance in order to avoid deciding federal constitutional issues unnecessarily. *See, e.g., Sate v. Moylett*, 836 P.2d 1329, 1333 (Or. 1992) (describing it as "axiomatic" that courts should resolve issues first on a "subconstitutional level"); *State v. Kennedy*, 666 P.2d 1316, 1318 (Or. 1983) (discussing the "often repeated" rule that "all questions of state law be considered and disposed of before reaching a claim that [the] state's laws fall short of a standard imposed by the federal constitution on all states"). Thus, under Oregon law, any state law procedural rules that would obviate the need to review federal constitutional issues—such as the one the Oregon Supreme Court applied on remand—should have been raised in the first instance, *before* the federal constitutional issues were decided by the Oregon courts and then by this Court.

Morris for alleged harm to non-parties violated Philip Morris's due process rights—that the Oregon Supreme Court first applied a purported independent state law ground for avoiding the constitutional issue. This Court should reverse and order a new trial to make clear to lower courts that they cannot belatedly use procedural mechanisms as an end-run around the Constitution and this Court's decisions.

It is a fundamental and bedrock principle of American jurisprudence that the United States Supreme Court is the ultimate arbiter of cases or controversies that come before it. *See Martin v. Hunters Lessee*, 14 U.S. 304 (1816). Accordingly, *all* lower courts must abide by decisions rendered by this Court. *See Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948) ("In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.") (citations omitted). Indeed, the Supreme Court explained over one hundred years ago the requirement that a lower court strictly comply with a Supreme Court mandate:

> When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution according to the

> mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); *see also Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209 (1931) (state courts are bound by the decisions of the United States Supreme Court construing federal law); *Sands v. Morongo Unif. Sch. Dist.*, 809 P.2d 809, 821 (Cal. 1991) (Lucas, J., concurring) ("On issues of federal constitutional law, [] court[s are] bound under the supremacy clause of the United States Constitution by applicable decisions of the United States Supreme Court.") (citations omitted).

The issue before this Court previously—and the issue that this Court decided—was whether States are allowed to permit a jury to punish a defendant for harm to non-parties arising from conduct similar to that at issue in the case before it. The Oregon courts ruled on numerous occasions that this was a proper consideration for the jury, and that issue was certified to this Court for review. It was only after this Court determined that the jury's consideration of harm to non-parties violated Philip Morris's due process rights that the Oregon Supreme Court raised an obscure state law procedural

roadblock as justification for ignoring this Court's mandate and its refusal to apply the due process principles laid out by this Court to the case before it. This extreme exercise of "form over substance" should be rejected, as it risks not only trampling the due process rights of Philip Morris in this case, but also provides lower courts—especially state courts applying state law—with a blueprint for ignoring this Court's mandates when they do not agree with the decisions this Court reaches.

B. This Court Should Act To Ensure That Other Courts Do Not Follow The Oregon Supreme Court's Lead In Disregarding The Directives Of This Court.

Unfortunately, the Oregon Supreme Court's invocation of post-hoc procedural mechanisms as a pretext for sidestepping this Court's mandate is not an isolated incident. In May 2007, this Court vacated the judgment in *Buell-Wilson v. Ford Motor Co.*, 46 Cal. Rptr. 3d 147 (Cal. Ct. App. 2006), and remanded the case to the California Court of Appeal for reconsideration in light of this Court's prior decision in this case. *Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007). On remand, rather than apply this Court's mandate in *Philip Morris* as directed, the *Buell-Wilson* court followed the Oregon Supreme Court's lead and held that because the jury instructions Ford had proposed "incorrectly and incompletely stated [California] law" on separate, distinct issues, Ford had "forfeited its due process

challenge to the punitive damages award." *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 328 (Cal. Ct. App. 2008). In fact, the *Buell-Wilson* court cited the Oregon Supreme Court's action in this case in justifying its own ruling. *Id.* at 337.

Accordingly, the California Court of Appeal did not evaluate whether State procedures had adequately protected Ford against the risk that it would be punished for harm to non-parties, as directed by this Court in *Philip Morris*, 127 S.Ct at 1064. Indeed, the California Court of Appeal went so far as to suggest that Ford's failure to preserve its objections meant that this Court did not have jurisdiction over Ford's due process claim, stating "[t]he United States Supreme Court lacks jurisdiction over federal questions 'not pressed or passed upon in state courts.'" *Buell-Wilson*, 73 Cal. Rptr. 3d at 332.[8] As was the case in the Oregon courts, the California Court of Appeal never suggested during its review that this Court would not have jurisdiction to consider Ford's due process claims. Moreover, the suggestion that federal jurisdiction was improper makes no sense given that a number of courts, including this Court, spent time and resources considering Ford's due process claims

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[8] In an apparent attempt to backstop its refusal to apply the standard established by this Court in *Philip Morris*, the *Buell-Wilson* court also held that its award of punitive damages—which it reduced from $76 million to $55 million after adjusting plaintiff's non-economic damages—was not unconstitutionally excessive. 73 Cal. Rptr. 3d at 318.

on the assumption that the claims were ripe for review.[9]

In the past, this Court has not hesitated to reject a lower court's attempt to use independent state law grounds as a pretext for ignoring the Court's mandate. *See, e.g., Yates v. Aiken*, 484 U.S. 211, 218 (1988) (finding that South Carolina was bound to apply the federal relief found by the Court because "it [had already] considered the merits of the federal claim"); *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam) (summarily reversing Alabama state court's refusal to apply this Court's mandate on the basis that the order at issue had state law deficiencies separate and apart from those found unconstitutional by this Court). In *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 295-96 (1964), this Court once again rebuked the Alabama Supreme Court's attempt to use a "nonfederal" rule of court concerning brief construction to prevent this Court from ruling on Alabama's attempt to ouster the NAACP from the State. The Court admonished the Alabama Supreme Court for applying an independent state procedural rule with "pointless severity," describing the Alabama Court's actions as "wholly unacceptable" in

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[9] The California Supreme Court has granted review in *Buell-Wilson*, but has deferred briefing pending this Court's decision in the present case. *Buell-Wilson v. Ford Motor Co.*, 2008 WL 2892940 (Cal. Jul. 9, 2008). This presents yet another layer of wasted time and resources for the court and the parties arising out of a lower court's refusal to abide by the directive handed down by this Court.

light of the NAACP's "serious constitutional claims." *Id.* at 296. The Court went on to state that "[t]he consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *Id.* at 297.

Similarly, in *Ford v. Georgia*, 498 U.S. 411 (1991), this Court addressed a state court's attempt to bar Supreme Court review through the invocation of an independent state procedural rule. The Georgia Supreme Court had concluded that a petitioner's federal constitutional *Batson* claim was barred by a state procedural rule requiring such claims to be "raised prior to the time the jurors selected to try the case are sworn." *Id.* at 418. This Court reversed, holding that novel procedural requirements that are neither firmly established nor regularly followed in state practice cannot be allowed to prevent Supreme Court review. *Id.* at 423 (holding that "[n]ovelty in procedural requirements cannot be permitted to thwart review in this Court" and that "only a firmly established and regularly followed state practice" is sufficient to bar review by the Supreme Court) (internal quotation marks and citations omitted). As discussed in Petitioner's Brief, the independent state law ground cited by the Oregon Supreme Court is neither "firmly established" nor "regularly followed," and therefore is an insufficient ground for refusing to apply the

constitutional standard established previously by this Court. *See* Pet. Br. at 35-42.

Just as this Court made clear in *Yates*, *Patterson*, *Flowers*, and *Ford* that it will not allow state courts to use independent state law grounds as a pretext to avoid applying this Court's decisions, it should prohibit the Oregon Supreme Court from denying Philip Morris the constitutional rights to which this Court has already found it is entitled. Indeed, allowing the Oregon Supreme Court to flagrantly disregard the Court's mandate here would give lower courts—especially state courts invoking post-hoc state law procedural rules—an opportunity to manipulate this Court's rulings in the future. Given the serious nature of the violation of petitioner's due process rights, and the Oregon Supreme Court's refusal to uphold those rights or put in place procedures to protect those rights—even after being instructed to do so by this Court—the Court should reverse the punitive damages award and order a new trial.

C. The Oregon Supreme Court Ignored The Fact That This Court Placed The Burden On The States To Ensure That Due Process Rights Are Protected.

In its prior decision, this Court made clear that due process principles forbid the *State* from imposing punitive damages for injuries to non-parties. *See Philip Morris*, 127 S.Ct. at 1063 (noting

that "the Constitution's Due Process Clause forbids a *State* to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties"); *see also id.* at 1062 (requiring a "*State* insist[] upon proper standards that will cabin the jury's discretionary authority" so as not to deprive a defendant of its due process rights); *id.* at 1064 (noting that it is "constitutionally important for a *court* to provide assurances that the jury will ask the right question, not the wrong one" in considering punitive damages awards) (emphases added). The Court further held that the State bears responsibility for ensuring the constitutionality of its proceedings, stating that "[a]lthough the States have some flexibility to determine what *kind* of procedures they will implement, federal constitutional law obligates them to provide *some* form of protection in appropriate cases." *Philip Morris*, 127 S.Ct. at 1065 (emphasis in original).

The Oregon Supreme Court ignored these explicit directions. Instead, it attempted to place the burden for ensuring the constitutionality of the jury instructions solely on the parties. *See Williams III*, 176 P.3d at 1261 (noting that under Oregon law, it is a requirement "that a party to litigation take responsibility for the jury instructions that a trial court either gives or refuses to give"). Because it found that Philip Morris's proposed jury instruction was incorrect on issues of Oregon law wholly distinct from the due process issue before it—and the issue that this Court ruled upon previously—the Oregon

Supreme Court refused to address the due process violation this Court directed it to review. *Id.* at 1263-64.[10] The Oregon Supreme Court, however, failed to even consider whether the State had fulfilled its obligation to put in place a procedure "to cabin the jury's discretionary authority," *Philip Morris*, 127 S.Ct. at 1062, so as not to deprive Philip Morris of its due process rights. Indeed, it is clear that the State did not satisfy due process in this regard. The instructions given allowed the jury to do just the opposite—to consider harm to non-parties when determining what punitive damages to impose—which this Court ruled is a violation of Philip Morris's due process rights. Thus, the Court should reverse the punitive damages award against Philip Morris, order a new trial, and once again instruct the Oregon Supreme Court to put appropriate procedures in place to insure the jury asks the right questions about punitive damages, not the wrong ones.

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[10] Philip Morris attempted to take responsibility to ensure that the jury was properly instructed with respect to the due process issues involved by arguing that the jury should be instructed that it could not consider harm to non-parties in assessing punitive damages. This argument was rejected by the trial court—as well as the Oregon Court of Appeals and the Oregon Supreme Court—as being an improper recitation of federal constitutional law. *Williams III*, 176 P.3d at 1259. Under the circumstances, it is hard to imagine what more Philip Morris could have done to insure the trial court gave jury instructions that would protect Philip Morris's constitutional rights.

II. ALLOWING LOWER COURTS TO INVOKE POST-HOC PROCEDURAL ROADBLOCKS WASTES VALUABLE RESOURCES OF THE COURT AND THE PARTIES.

Apart from the bedrock principle that inferior courts must abide by this Court's mandates, significant policy considerations lead to the same conclusion—this Court should not countenance attempts by state courts to interpose post-hoc, state law procedural roadblocks as a way to avoid implementing decisions rendered by this Court. Specifically, considerations of judicial economy and fairness to the parties weigh in favor of this Court reversing the judgment of the Oregon Supreme Court and ordering a new trial to ensure that these compelling policy considerations are not frustrated by the inappropriate actions of the Oregon Supreme Court. The courts in the United States—including this Court—are faced with dockets that are becoming more and more crowded. Indeed, this Court's caseload "has increased steadily to a current total of more than 10,000 cases on the docket per Term."[11] In 2006, less than one percent of the cases filed in this Court were argued.[12] These figures

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[11] *See* THE JUSTICES' CASELOAD, available at *http://www.supremecourtus.gov/about/justicecaseload.pdf*.

[12] *See* 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9, available at *http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf*.

reflect the care with which this Court husbands its resources and evidences the need to make sure that cases that make it to the Court are ripe for review. *See, e.g., Schiro v. Indiana*, 493 U.S. 910, 911 (1989) (noting that United States Supreme Court's *certiorari* docket is "so crowded"); *Rogan v. Menino*, 175 F.3d 75, 76 (1st Cir. 1999) (referring to "busy trial courts, struggling to manage crowded dockets").[13]

In light of the ever-increasing demands on the court system, and the courts' limited resources to deal with these demands, it is imperative that attention be given to the important interest of judicial economy. *See Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 390 (1985) (Burger, J., concurring) (stating that "the federal courts have direct interests in ensuring that their resources are used efficiently"); *United States v. Eufrasio*, 935 F.2d 553, 568 (3d Cir. 1991) (noting "[t]he public interest in judicial economy"); *see also Kerr v. U. S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 403 (1976) (noting that "particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage

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[13] *See also* THE COURT AND CONSTITUTIONAL INTERPRETATION 2, available at *http://www.supremecourtus.gov/about/constitutional.pdf* ("The Justices must exercise considerable discretion in deciding which cases to hear, since more than 10,000 civil and criminal cases are filed in the Supreme Court each year from the various state and federal courts.").

piecemeal litigation"); Amy Scott, *Limiting The Jurisdiction Of The Federal Circuit: How Holmes Alters The Landscape Of Patent Cases On Appeal*, 38 GA. L. REV. 429, 433 (Fall 2003) ("The litigation explosion during the post-World War II era caused a backup of cases throughout the judicial system.") (citation omitted). Allowing lower courts to work an end-run around a decision of this Court after that decision has been rendered on the merits is entirely inconsistent with the importance of maintaining judicial economy in an era of over-crowded dockets. Indeed, it needlessly wastes the precious resources of the courts, as well as the time and energy of judges, clerks, attorneys, and parties.

In addition to wasting valuable time and resources, the Oregon Supreme Court's application of a procedural rule at this late stage of the litigation is fundamentally unfair to the parties. Litigants should not be required to go through years of litigation and expense at multiple levels of state court proceedings—culminating in applications to this Court for relief (for now a third time)—only to have the state high court ignore this Court's clear guidance. Yet, this is precisely the scenario that the Oregon Supreme Court has imposed upon Philip Morris, having waited until *after* this Court ruled before raising a purported independent and adequate state ground for its decision for the *first* time. Allowing a state court to avoid the merits of a federal constitutional question after *it* has teed that question up for this Court runs afoul of the

important goal of fundamental fairness to litigants. *See, e.g., Intercon Research Associates, Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 57 (7th Cir. 1982) (noting that "one of the goals of the judicial system...is to ensure fundamental fairness to all parties"). The Court should reverse the judgment of the Oregon Supreme Court and order a new trial to reinforce the principle that cases should not be sent to this Court unless they are ripe for review, and that once this Court decides an issue, it is too late to interpose state law procedural barriers to prevent implementing this Court's rulings.

CONCLUSION

For the foregoing reasons, and those presented by the Petitioner, the judgment below should be reversed, and a new trial should be ordered.

Respectfully submitted,

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

Arvin Maskin
Konrad Cailteux*
B. Keith Gibson
Jed P. Winer
Isabella C. Lacayo
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

*Counsel of Record

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